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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS MARINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth and/or Sixth Amendment rights of the Petitioner to trial by jury were violated when, after a jury effectively acquitted him of murder following a full trial, the trial court, at a sentencing for other offenses, determined—using a preponderance of evidence standard—that Petitioner was nonetheless guilty of murder and sentenced him to maximum consecutive sentences on the basis of that determination?

2. Whether the Due Process Clause requires a heightened standard of proof greater than a mere preponderance of evidence where, after a jury effectively acquitted the defendant, the trial court imposed maximum consecutive sentences for the acquitted conduct based upon the preponderance standard?

PARTIES TO THE PROCEEDINGS

1. Petitioner, Louis Marino.
2. Rocco E. Infelise and Robert Bellavia were co-defendants and appellants with Louis Marino in the proceedings below. They are separately petitioning for review by the Court on other grounds. To the extent applicable, they seek to adopt Louis Marino's arguments herein as their own.
3. Respondent, United States of America.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
ADOPTION	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
JUDICIAL DETERMINATION OF CRIMINAL GUILT BY A PREPONDERANCE OF EVIDENCE AFTER A JURY HAS REFUSED TO CONVICT AND A MAXIMUM CONSECUTIVE SENTENCE IMPOSED THEREON UTTERLY VIOLATES CONSTITUTIONAL RIGHTS OF DUE PROCESS AND TO TRIAL BY JURY ...	5
A. Petitioner's Basic Constitutional Rights Were Violated When, after a Jury Effectively Acquitted Him of Murder, the Trial Court Subsequently Determined—By a Preponderance of Evidence Standard—That Petitioner Was Guilty of Murder, and Then Sentenced Him to Maximum Consecutive Sentences on the Basis of this Determination	6

B. The Court Should Articulate a Heightened Standard of Proof of Greater Magnitude than the Preponderance Standard to Comport with Due Process for Judicial Factfinding at Sentencing 14

CONCLUSION 25

APPENDICES

A—March 1, 1996 Opinion of the U.S. Court of Appeals for the Seventh Circuit ..... A-1 - A-18

B—May 23, 1996 denial of petition for rehearing and suggestion for rehearing *en banc* by the U.S. Court of Appeals for the Seventh Circuit B-1

C—July 22, 1993 Memorandum Opinion and Order by the U.S. District Court ..... C-1 - C-99

D—August 19, 1993 U.S. District Court Sentencing Hearing Transcript ..... D-1 - D-39

TABLE OF AUTHORITIES

CASES	PAGE(S)
Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972) ...	23
Dandridge v. Lockhart, 36 F.3d 773 (8th Cir. 1994)	20
Estelle v. Williams, 425 U.S. 501 (1976)	23
Green v. United States, 355 U.S. 184 (1957) ...	5
Kinder v. United States, 504 U.S. 946 (1992) ..	15
McMillan v. Pennsylvania, 477 U.S. 79 (1986) ..	*passim*
Sullivan v. Louisiana, 508 U.S. 275 (1993)	7, 8
Taylor v. Kentucky, 436 U.S. 478 (1978)	23
United States v. Barton, 992 F.2d 66 (5th Cir. 1993)	19, 20
United States v. Brady, 928 F.2d 844 (9th Cir. 1991)	9, 16
United States v. Carpenter's Goldfish Farm, 998 F.2d 692 (9th Cir. 1993)	16
United States v. Eddy, 8 F.3d 577 (7th Cir. 1993) .	18
United States v. Gaudin, 115 S.Ct. 2310 (1995) ..	6
United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990)	9, 19
United States v. Lombard, 72 F.3d 170 (1st Cir. 1995)	20, 21, 22, 23
United States v. Long Crow, 37 F.3d 1319 (8th Cir. 1994)	20
United States v. Masters, 978 F.2d 281 (7th Cir. 1992)	9, 10, 19

United States v. Mergerson, 4 F.3d 337 (5th Cir. 1993) 15

United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994) 16

United States v. Rodriguez, 73 F.3d 161 (7th Cir. 1996) 16, 17, 18, 24

United States v. Wade, 388 U.S. 218 (1967) 20

In re Winship, 397 U.S. 358 (1970) 7, 12

Witte v. United States, 15 S.Ct. 2199 (1995) ... 15

Statutes, Constitution and Rules

18 U.S.C. § 34 16

18 U.S.C. § 1963(a) 11

28 U.S.C. § 1254(1) 2

28 U.S.C. §1291 2

United States Constitution, Fifth Amendment ... 2, 6

United States Constitution, Sixth Amendment ... 3, 6

United States Sentencing Guideline 5G1.2(d) 3, 11

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PETITION FOR WRIT OF CERTIORARI

Petitioner Louis Marino ("Petitioner") prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS AND ORDERS BELOW

The March 1, 1996 opinion of the Court of Appeals for the Seventh Circuit, entitled *United States v. DiDomenico*, is reported at 78 F.3d 294 and is reprinted as Appendix A *infra*. The Seventh Circuit's denial of petition for rehearing and suggestion for rehearing *en banc* was issued on May 23, 1996 and is reprinted as Appendix B *infra*. The appeal was consolidated with the

appeals of Petitioner's co-defendants, Rocco E. Infelise and Robert Bellavia, each appeal stemming from convictions and sentences under Indictment 90 CR 87.

ADOPTION

To the extent applicable, Petitioner adopts and incorporates by reference herein the arguments raised in the Petition for Writ of Certiorari on file or to be filed on behalf of petitioners Rocco E. Infelise and Robert Bellavia. Because petitioners Infelise and Bellavia were tried with Petitioner Marino and were treated similarly on appeal from the trial court, certain arguments raised in the Petition of Infelise and Bellavia will also be applicable to Petitioner Marino.

STATEMENT OF JURISDICTION

The Court of Appeals for the Seventh Circuit, with jurisdiction pursuant to 28 U.S.C. §1291, issued its opinion on March 1, 1996. A timely petition for rehearing, with *en banc* suggestions, was denied on May 23, 1996. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution, in part, states:

> No person shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the United States Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

U.S. Sentencing Guideline 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment then the sentence imposed on one or more of the other counts shall run consecutively but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

STATEMENT

Petitioner seeks certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

1. On February 6, 1990, the Special September 1987 Grand Jury empaneled in Chicago, Illinois, returned a multi-count criminal indictment against twenty defendants. Petitioner, along with *inter alia* co-defendants Infelise and Bellavia, was indicted for the murder of bookmaker Hal Smith, conspiracy to commit murder, tax violations, illegal gambling, and various racketeering acts as part of a general RICO conspiracy.

2. On October 15, 1991, an anonymous jury was empaneled and trial commenced. On March 10, 1992, Petitioner was found guilty of tax fraud, illegal gambling, and racketeering acts ranging from gambling to extortion. With respect to all murder charges (substantive

counts and those under RICO), the jury could not reach a verdict with respect to Petitioner.[1] (App. C-1).

3. On August 19, 1993, at sentencing, the trial court found—*by a preponderance of the evidence*—that Petitioner was "accountable" for the murder of Hal Smith and was "part of the conspiracy to murder Hal Smith." (App. C-33, C-52). By applying guidelines which did not exist at the time of the murder (or at the time of the indictment), the trial court attempted to sentence Petitioner to life imprisonment. (App. D-31). However, because the convicted offenses did not carry life sentences, the trial court imposed the maximum sentence on Petitioner for each of three convicted counts, with all sentences to run consecutively. Thus, the trial judge "stacked" Petitioner's sentence, so that he received 28 years imprisonment[2] when his sentence otherwise (i.e. without any judicial finding at sentencing regarding his alleged responsibility for murder) would only have been 87 to 108 months (7-9 years). (App. D-31, D-39).

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[1] Co-Defendants Infelise and Bellavia were similarly charged. They were also found guilty of tax fraud, illegal gambling, and various racketeering acts ranging from gambling to extortion. Like Petitioner, they were effectively acquitted of the murder (both substantive and RICO) counts and the conspiracy to commit murder count, though they (unlike Petitioner) were found under the RICO conspiracy to have conspired to murder Hal Smith.

[2] Petitioner was sentenced to 20 years for the RICO conspiracy, 5 years for an illegal gambling conspiracy, and 3 years for filing one false tax return. Mr. Infelise was sentenced to 43 years more than the statutory maximum on the RICO conspiracy. Mr. Bellavia was sentenced to 30 years with a guideline range of less than 7 years if the convicted conduct was not involved. (App. D-30, D-31, D-39).

REASONS FOR GRANTING THE WRIT

JUDICIAL DETERMINATION OF CRIMINAL GUILT BY A PREPONDERANCE OF EVIDENCE AFTER A JURY HAS REFUSED TO CONVICT AND A MAXIMUM CONSECUTIVE SENTENCE IMPOSED THEREON UTTERLY VIOLATES CONSTITUTIONAL RIGHTS OF DUE PROCESS AND TO TRIAL BY JURY.

After a five month trial, the jury effectively *acquitted* Petitioner of any responsibility for murder and conspiracy to commit the murder of Hal Smith.[3] However, based almost entirely upon the highly suspect testimony of another defendant in the case (William Jahoda) and notwithstanding the fact that the jury made absolutely no findings of guilt against Petitioner regarding murder or conspiracy to commit murder, the trial court imposed a virtual "life sentence" on the Petitioner after its determination that Petitioner—more likely than not—was responsible for the murder of Hal Smith.

In essence, a trial which lasted five months was rendered substantially meaningless by the sentencing court. The Government's strategy of prosecuting several counts of gambling, extortion and tax violations, with weak murder charges thrown in, paid off: despite its failure to convince a constitutionally empaneled jury of Petitioner's guilt beyond a reasonable doubt on the murder charges, the Government still obtained the punishment it desired.

Because Federal Circuits are split regarding the use of acquitted conduct and the standard of proof to be employed at sentencing and because basic rights to due

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[3] *Green v. United States*, 355 U.S. 184, 190-191 (1957) (jury not returning a verdict on a criminal charge is an "implicit acquittal").

process and trial by jury are implicated, these issues are ripe for the Court's consideration at this time.

A. Petitioner's Basic Constitutional Rights Were Violated When, after a Jury Effectively Acquitted Him of Murder, the Trial Court Subsequently Determined—By a Preponderance of Evidence Standard—That Petitioner Was Guilty of Murder, and Then Sentenced Him to Maximum Consecutive Sentences on the Basis of this Determination.

The Fifth Amendment to the United States Constitution guarantees that no one shall be deprived of liberty without "due process of law." The Sixth Amendment mandates that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." The Court has recently stressed that these provisions *require* criminal convictions to rest upon jury determinations that a defendant is guilty of *every* element of the crime for which he or she is charged—beyond a reasonable doubt.

In *U.S. v. Gaudin*, 115 S.Ct. 2310, 2313 (1995), the Court, appropriately observing that the "right to have a jury make the ultimate determination of guilt has an impressive pedigree," held that the Government's position that "materiality" of false statements within the meaning of Title 18 U.S.C. §1001 could be determined by a court rather than a jury was wrong. This Court relied upon and quoted two particularly relevant passages in its affirmance of the reversed conviction:

> Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and

> neighbors . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . .
>
> * * *
>
> *"The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'"* [*Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993)]

Id. at 2313, 2316 (emphasis added).

In *Sullivan v. Louisiana*, the Court held that a constitutionally deficient "reasonable doubt" instruction required the reversal of a conviction. 508 U.S. 275, 281-282 (1993). Discussing the interrelationship between the Fifth Amendment right to proof beyond a reasonable doubt before conviction and the Sixth Amendment right to have a jury decide whether the Government met its burden, the Court held:

> It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.

Id. at 278 (emphasis in original).[4]

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[4] In *In re Winship*, 397 U.S. 358 (1970), where the Court held that the reasonable doubt standard of criminal law should apply to juveniles as well as adults, the Court wrote:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leave people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his *government cannot adjudge him guilty of a criminal offense with-*

(continued...)

In the instant case, Petitioner sought a trial by jury. He chose—as was his constitutional right—to have the jury decide his guilt or innocence. The jury refused to convict him of having anything to do with the murder of Hal Smith. Nonetheless, the trial court at sentencing, found by a preponderance of evidence that Petitioner was responsible for this murder and attempted to sentence him to life imprisonment. Then, recognizing that it could not hand down a life sentence because of the statutory penalty limits, the trial court increased Petitioner's sentence by 20 years based upon this judicial finding. (App. C-33, C-52, D-31, D-39).

The Government was simply unable to prove to a constitutionally empaneled jury that Petitioner had any hand in the murder of Hal Smith. To allow the trial court to subsequently find—using a lesser preponderance of the evidence standard—that Petitioner was nonetheless guilty of a crime for which the jury did not convict him and then subject him to a greatly enhanced punishment on that basis necessarily violates the Fifth and Sixth Amendments to the United States Constitution, as consistently applied by this Court. If in *Sullivan*, *supra*, a jury finding of probable guilt and a judicial finding of guilt beyond a reasonable doubt is constitutionally infirm, then surely what happened to Petitioner here must be equally infirm. The jury effectively acquitted Petitioner of having anything to do with the murder of Hal Smith, despite having four opportunities to so convict

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[4] (...continued)

> *out convincing a proper fact finder of his guilt with utmost certainty*

Id. at 364 (emphasis added).

him.[5] Nonetheless, the trial court at sentencing subsequently made a finding of guilt by preponderance of the evidence with respect to Petitioner's responsibility for the murder of Hal Smith. Such an egregious violation of basic constitutional rights cannot be allowed to stand.

The trial court relied upon the Seventh Circuit's decision in *U.S. v. Masters*, 978 F.2d 281, 287 (7th Cir. 1992) to support its inquiry and finding at sentencing that a preponderance of the evidence supposedly showed that Petitioner was responsible for the death of Hal Smith. (App. C-33). Despite the fact that other Federal Circuits will *not* apply such a preponderance inquiry at sentencing,[6] the *Masters* court interpreted the Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) as permitting such an inquiry. However, not only did the *Masters* court highlight the troublesome split among the Circuits, it expressed its "sympathy with the conclusion" that—under certain circumstances as alluded to in *McMillan*—the preponderance standard cannot be employed at sentencing. 978 F.2d at 287.

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[5] The Government implicated Petitioner with the Hal Smith murder in four different ways: Racketeering Acts 17(a)-(b) of Count I charged him with conspiring to murder and murdering Hal Smith and Counts 8-9 charged him with conspiring to murder and murdering Hal Smith. (App. C-1).

[6] The *Masters* court conceded that the Ninth Circuit "forbid[s] district judges to consider conduct of which a person has been acquitted" (*United States v. Brady*, 928 F.2d 844 (9th Cir. 1991)) and that the Third Circuit has held that an enhanced burden of persuasion (greater than the preponderance standard) is warranted when a court is making findings at sentencing which will result in a "much more severe penalty." *United States v. Kikumura*, 918 F.2d 1084, 1098-1102 (3rd Cir. 1990). *Masters*, 978 F.2d at 286.

Significantly, this case can be readily distinguished from the facts and reasoning of *McMillan*—the case cited not only by *Masters, supra*, but by virtually all courts that do permit the preponderance standard in sentencing. In *McMillan*, the defendant challenged a Pennsylvania law imposing a mandatory minimum prison sentence of five years for an individual found at sentencing, by preponderance of the evidence, to have "visibly possessed a firearm" in connection with his or her convicted offense. The Court found highly significant the fact that the prosecution was not "relieve[d] . . . of its burden of proving guilt" because the statute "only becomes applicable *after a defendant has been duly convicted of the crime for which he is to be punished.*" *Id.* at 87 (emphasis supplied). Accordingly, the Court noted:

> [The challenge statute] operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. [The statute] "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. *The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.*

Id. at 88 (emphasis added). Thus, while the Court held that the statute at issue in *McMillan* did not violate the Due Process Clause, it explicitly and strongly suggested that such a violation would occur if the magnitude of a contemplated sentence is sufficiently great so that the sentencing hearing can be characterized as "a tail which wags the dog of the substantive offense." *Id.*

However, as noted, the current case is crucially different from *McMillan*. Unlike the prosecution in *McMillan*, the Government here *was* relieved of its burden of proving guilt beyond a reasonable doubt on the murder charges against Petitioner for which the Government sought punishment. Thus, while the prosecution in *McMillan* still had to convict on the charged offenses before sentence enhancement could occur, Petitioner here had his sentence enhanced on the basis of offenses for which he was *acquitted* by the jury. Accordingly, rather than merely "upping the ante" for Petitioner (as in *McMillan*), the trial court changed the rules of the game after the Government squarely lost its hand.

In other words, the Pennsylvania statute at issue in *McMillan* provided for a sentencing range of 1 to 10 years, but stated that the court had to impose at least a five-year minimum if a gun was used. The maximum remained at 10 years. Here, the maximum RICO conspiracy penalty was 20 years (18 U.S.C. 1963(a)), but the guideline level for the Petitioner was found by the trial court to be a level 28 (87 to 108 months). The gambling and tax counts should have been grouped with the RICO conspiracy. (U.S.S.G. 5G 1.2(d)). To vindicate the guidelines, as applied after employing the preponderance standard, the trial court here imposed maximum consecutive sentences which otherwise could not have been imposed—a situation not present in *McMillan*.

The egregious nature of the trial court's conduct is further demonstrated by basic rules of law cited by Justice Stevens' dissent in *McMillan*:

> "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of

> which the defendant is charged." *Patterson v. New York*, 432 U.S. 197 (1977) . . . .
>
> * * *
>
> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, *a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.*" [*quoting In re Winship*, 397 U.S. 358, 363-363 (1970)].

Id. at 96, 97 (emphasis added).

Moreover, as Justice Stevens pointed out, the Court has expressly held that:

> "The safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty."
>
> * * *
>
> It is likewise irrelevant that petitioners had first been convicted of predicate felonies. *"Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar."*

Id. at 99 n. 3 (*quoting Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)), 103 n. 6 (*quoting Jackson v. Virginia*, 443 U.S. 307, 323-324 (1979)) (emphasis added).

Therefore, based upon the Court's *own* prior due process analyses, it is plainly unconstitutionally infirm for a

court to justify the use of a preponderance standard at sentencing based upon a defendant's "convicted" status. Such a defendant is entitled to the same constitutional protection as any other individual. This is especially true in a case like this one, where the defendant was convicted of unrelated offenses and is then subjected to the preponderance standard at sentencing regarding offenses for which he was just acquitted. There can be no doubt that the Due Process Clause protects even a convicted citizen who risks, at sentencing, even greater stigmatization and, more importantly, far greater loss of liberty by virtue of the trial court's power to act—under a less stringent standard—as a trier of fact at variance with a jury that has already so acted.

This would seem to be a clear enough issue for the Court to resolve, notwithstanding the split among the Circuits. The focus at Petitioner's sentencing was not his reputation, or prior convictions, or immoral acts; rather, the sentencing court became the trier of fact on the very charges for which Petitioner had just been tried by a jury and as to which the Government had failed to prove guilt beyond a reasonable doubt. Of note is the fact that the jury acquitted or failed to reach verdicts on all counts regarding another co-defendant, Robert Salerno, whom the trial court was obviously unable to sentence, even on a preponderance theory, because there were no "smaller" convicted counts. While Mr. Salerno was entitled to the right to hold the Government to its constitutionally-mandated burden of proof beyond a reasonable doubt by a jury, Petitioner was denied that basic right; instead, he was sentenced to the maximum—as if he had been actually convicted of the acquitted charges.

Petitioner respectfully submits that the misunderstanding created by *McMillan* and its progeny is overripe for rectification and guidance by the Court. The injustices that have resulted and will continue to result from this confusion and misapplication of the law should mandate the Court's further attention. Regardless of the personal opinions which the Government and the trial court may have of Petitioner or his former associates, regardless of speculation and surmise, Petitioner is nonetheless entitled to the basic rights afforded by the United States Constitution. It should go without saying: Petitioner must not be subjected to loss of liberty and stigmatization for criminal conduct which was not proven beyond a reasonable doubt by his chosen trier of fact.

B. The Court Should Articulate a Heightened Standard of Proof of Greater Magnitude than the Preponderance Standard to Comport with Due Process for Judicial Factfinding at Sentencing.

If the Court declines to declare unconstitutional a trial court's factfinding at sentencing regarding guilt or innocence on a particular offense in a manner contrary to the jury's factfinding as to the very same offense, then—at the very least—due process mandates that the sentencing court employ a heightened standard of proof, of greater magnitude than a mere preponderance. This is especially significant where, as here, a defendant is subjected to greatly enhanced punishment by virtue of the sentencing court's factfinding.

Former Justice White previously expressed a strong interest in having the Court clarify "the applicable standards under the new sentencing regime." As noted in his dissent to the Court's denial of the petition for writ of

certiorari in *Kinder v. United States*, 504 U.S. 946, 949 (1992), the Federal Sentencing Guidelines do not explicitly adopt any standard of proof required for factfinding at sentencing: "[W]e have not visited this issue since its new procedures took effect in November 1987."[7]

In *United States v. Mergerson*, 4 F.3d 337 (5th Cir. 1993), the Fifth Circuit considered how due process is infused into sentencing where a mandatory life sentence might result from a series of drug-related convictions.[8] The *Mergerson* panel noted the great morass surrounding this due process issue:

> We recognize a growing number of cases decided by courts and other circuits in which a higher standard of proof has been suggested or required when a finding of a particular fact relevant to sentencing dramatically alters the sentencing options of the court to the disadvantage of the defendant. *See e.g., United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990) (requiring the finding by clear and convincing evidence standard); *United States v. Julian*, 922 F.2d 563, 569 n. 1 (10th Cir. 1990) (and remanding to district court, suggesting the same); *United States v. Restrepo*, 946 F.2d 654, 661 n. 12 (9th Cir. 1991) (en banc) (citing *Kikumura* with approval); *United States v. Townley*, 929 F.2d 365, 370 (8th Cir. 1991) (same); *see also* Richard Husseini, Comment, The Federal

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[7] *See also Witte v. United States*, 115 S. Ct. 2199, 2212 (1995) (Stevens, J., dissenting) ("I believed at the time and continue to believe that *McMillan* was wrongly decided.").

[8] As noted *supra*, the trial court tried to impose a life sentence on Marino but was reminded by counsel that she was limited by the maximum statutory sentences. She thus ran the sentences consecutively to get as close to a life sentence as possible. (App. D-31, D-39).

> Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof, 57 U. Chi. L. Rev. 1387 (1990); *but see United States v. Masters*, 978 F.2d 281, 287 (7th Cir. 1992). We also recognized dicta in a Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed. 2d 67 (1986), to the same extent. *See Id.* at 88, 106 S.Ct. at 2417 (suggesting that in cases where certain sentencing fact is a "tail which wags the dog of the substantive offense," reasonable doubt standard may be required); *see also Kinder v. United States*, ___ U.S. ___, 112 S.Ct. 2290, 119 L.Ed. 2d 214 (1992) (White, J., dissenting from denial of certiorari) (arguing that courts should grant certiorari to decide whether higher standard of proof than mere preponderance standards should be applied in guidelines cases requiring dramatically higher of certain sentencing fact found).

Id. at 343-344.[9]

In *United States v. Rodriguez*, 73 F.3d 161 (7th Cir. 1996), the defendant, a thrice-convicted felon, was con-

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[9] *See also United States v. Brady*, 928 F.2d 844, 854 (9th Cir. 1991) (court held that acquitted conduct could not be used to circumvent statutory directives); *United States v. Carpenter's Goldfish Farm*, 998 F.2d 692, 695 (9th Cir. 1993) ("When a defendant has been found by a court to be erroneously convicted of a crime, the alleged crime may not then be considered by the sentencing court"); *United States v. Prevatte*, 16 F.3d 767 (7th Cir. 1994) (court held that the sentencing guidelines do not trump the statute 18 U.S.C. 34 and thus, there can be no life sentence without a jury recommendation) (18 U.S.C. 34 reads: "Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, *if the jury shall in its discretion so direct*, or, in the case of plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.") (emphasis added).

victed of a narcotics conspiracy and sentenced by the trial court to a term of mandatory life based upon a preponderance of evidence standard. Chief Judge Posner of the Seventh Circuit, dissenting from the denial of the petition for rehearing and suggestion for rehearing *en banc*, was deeply troubled by the fact that, even though the jury had difficulty convicting the defendant of delivery of ten ounces of marijuana, the trial court at sentencing employed the preponderance standard to find that defendant had actually sold more than 1,000 kilograms of marijuana, thus triggering a mandatory life sentence. *Id.* at 162.

Judge Posner's dissent, joined by Judge Wood, pointed out that the issue of "whether a heightened standard of proof, either clearly convincing evidence or proof beyond a reasonable doubt, is required in a case in which the real trial occurs at the sentencing hearing rather than at the trial of guilt . . . is a difficult and important question, worth the attention of the full [Seventh Circuit] court . . . ." *Id.* Expressing his concern with the manifest injustice inherent in this type of situation, Judge Posner wrote:

> [T]here is a serious question whether it is permissible to sentence a person to life in prison, without possibility of parole, at the end of a brief and casual sentencing hearing in which there is no jury, in which the rules of evidence are not enforced, in which the standard of proof is no higher than in an ordinary civil case, and in which the judge's decision will make the difference between a light punishment and a punishment that is the maximum that our system allows short of death.

Id.

Judge Posner further observed that because "evidence presented at a sentencing hearing is often unreliable, both because the rules of evidence are not enforced in such hearings" and because evidence is often presented by criminals formerly associated with the defendant on trial, "the risk of error cannot be reckoned trivial . . . ." *Id.* at 163.[10]

Accordingly, the dissent urged the employment of a "clear and convincing evidence" standard:

> Conceivably, the intermediate standard of proof would reduce the number of errors both in favor of and against defendants, for it would induce the government to conduct a more thorough investigation and preparation for the sentencing hearing, thus putting before the judge a more complete and accurate picture of the facts.

Id. at 163. The dissent further reasoned that "the difference between the standard of proof by preponderance of the evidence . . . and proof beyond a reasonable doubt,

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[10] Judge Posner's concerns regarding the weight afforded certain, suspect witness testimony are of utmost importance, especially where—as here—the witness is a former associate of the defendant who undoubtedly has a strong liberty and/or monetary interest tied in with his or her testimony.

While the credibility of a witness should be accepted absent compelling circumstances, a frequently mentioned reason for discounting witness credibility is that the testimony is contradicted by the laws of nature. *See United States v. Eddy*, 8 F.3d 577, 580 (7th Cir. 1993). Many of nature's teachings are found in the Bible. The Bible asks such things as whether the Ethiopian can change his skin, or whether the leopard his spots. Jeremiah 13:23. Along this vein, there is a serious question of whether the zeal for sentence reduction, coupled with government monies and immunity, may transform the perennial liar or criminal into a credible witness.

is so large that there is room for an intermediate standard that can be practically, not merely conceptually, distinguished from the extremes," especially in cases "where the issue is life imprisonment versus a much shorter term." *Id.*

Noting that the imposition of a clear and convincing evidence standard could be based upon the common law powers of the federal courts as well as the Constitution, Judge Posner wrote that this Court's decision in *McMillan v. Pennsylvania* plainly left open the possibility that such a standard would be employed by the courts (i.e. when factfinding at sentencing is the "tail which wags the dog"). *Id.* at 164. Moreover, as Judge Posner also observed, the Third Circuit in *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990) elected to adopt such a standard at sentencing. Finally, Judge Posner relied upon the 7th Circuit's own dicta in *U.S. v. Masters*, to the effect that courts throughout the country are faced with uncertainty *vis a vis* the burden of persuasion at sentencing: "Neither the Sentencing Reform Act nor the guidelines specifies a burden of persuasion, so courts must devise their own. We are free to modify the standard as wisdom gained from experience suggests." *Id.* at 163-164. (*quoting Masters*, 978 F.2d at 287).[11]

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[11] The clear and convincing or intermediate standard of review has been defined as "that weight of proof which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established, evidence so clear, directing weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy of the truth of the precise facts' of the case." *United States v. Barton*, 992 F.2d 66, 69 n.6 (5th Cir. 1993) (*citing with approval, Cruzan v. Dir, et al.*, 497 U.S. 261, 285 n.11 (1990)).

(continued...)

In what is perhaps the most analogous case to this one, the First Circuit in *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995) detailed the complex issues involved with the standard of proof in mandatory life cases. The defendant in *Lombard* was originally tried in state court for murder and was acquitted. Subsequently, he was indicted and convicted in federal court on firearms and other charges. At sentencing, under the guidelines, the district court found by a preponderance of evidence that the defendant had used the guns to commit "another offense"—specifically murder. Based upon this finding, he was sentenced to life without parole.

Relying upon *McMillan*, the *Lombard* court determined that this was a case in which life sentence enhancement

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[11] (...continued)

In the criminal context, the clear and convincing standard has been applied where the defendant is challenging his or her competency at the time of an offense under 18 U.S.C. §17. *See United States v. Barton*, 992 F.2d 66, 68-69 (5th Cir. 1993); *United States v. Long Crow*, 37 F.3d 1319, 1323 (8th Cir. 1994). The same clear and convincing standard applies when the government seeks to offer identification testimony following a successful challenge to an impermissible lineup. The Court has held that the government must demonstrate through "clear and convincing evidence" that the in-court identification "[was] based upon observations of the suspect other than the lineup identification." *United States v. Wade*, 388 U.S. 218, 240 (1967). In the context of federal habeas corpus, a habeas petitioner—in order to invoke the actual innocence exception—must prove "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner [guilty] under the applicable state law." *Dandridge v. Lockhart*, 36 F.3d 773, 774 (8th Cir. 1994).

Thus, it is apparent that the "clear and convincing" standard has been heavily utilized both for and against the government within the context of criminal litigation.

was the "tail which wags the dog" because "[t]he consideration of the murders at Lombard's sentencing upstaged his conviction for firearms possession." *Id.* at 177. The court thus held:

> The effect here has been to permit the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections, such as the requirement of proof beyond a reasonable doubt. This other conduct—murder—was surely of the most serious sort, but exactly the sort as to which our jurisprudence normally requires the government to meet its full burden of proof. When put to that proof in state court, the government failed.

Id. Thus, the *Lombard* court observed that, "[d]espite the nominal characterization of the murders as conduct that was considered in 'enhancing' or 'adjusting' Lombard's firearms conviction, the reality is that the murders were treated as the gravamen of the offense." *Id.* at 178. Accordingly, the First Circuit vacated the life sentence and remanded for downward revision in light of the due process concerns.

The *Lombard* court thus recognized a crucial due process issue with respect to the defendant in that case: "trial and conviction being turned into a means of achieving an end that could not be achieved directly. . . ." *Id.* The court further noted: "Through the post-trial adjudication of the murders under a lesser standard of proof, the federal prosecution obtained precisely the result that the Maine state prosecutors attempted, but failed, to obtain." *Id.* at 179.

There can be no doubt that the same prosecutorial motives were present in the instant case. Here too, the

Government could not obtain the conviction sought (i.e. a jury finding that Petitioner was somehow responsible for the murder of Hal Smith); thus, the Government tried and succeeded in "back dooring" the punishment for murder in conjunction with sentencing. As in *Lombard*, the murder inquiry by the sentencing court formed the "gravamen" of the offenses, despite the fact that Petitioner was constitutionally exonerated of the murder charges. Moreover, here, as in *Lombard*, there is a necessary due process concern involving "the proportion between the gravity of [the defendant's] offense of conviction and the severity of his punishment . . . the harshness of the life sentence in relation to the offense of conviction highlights the need for rigorous inquiry." *Id.* at 178.[12]

In summary, the *Lombard* court succinctly stated the crux of the very issues of concern in this case:

> [T]he sentencing phase of the defendant's trial produced the conclusion he had committed murder and mandated imposition of a life sentence, but without the protections which normally attend the criminal process, such as the requirement of proof beyond a reasonable doubt. Given the magnitude of the sentence "enhancement," the seriousness of the "enhancing" conduct in relation to the offense of conviction, and the seemingly mandatory imposition of the life sentence, this summary process effectively overshadowed the firearms charge and raises serious questions as to the proper allocation of the procedural

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[12] As stated *supra*, Petitioner's sentence was three to four times that for which the guidelines should have provided and only limited by the number of counts the trial court could find to stack consecutively. Mr. Infelise received 63 years because he had several tax counts which were stacked one on another.

> protections attendant to trial versus sentencing . . . . We would be hard put to think of a better example of a case in which a sentence "enhancement" might be described as a "tail which wags the dog" of the defendant's offense of conviction.

Id. at 179-180 (citations omitted).

Lurking in the background is yet another basic due process component: presumption of innocence. In *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Court, in an opinion written by Chief Justice Burger, held: "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Petitioner never pled guilty, nor was he found guilty of murdering Hal Smith. Nevertheless, his alleged responsibility for this murder was the epicenter of his sentencing proceeding. Thus, a patent constitutional quandary arises: what happened to the presumption of innocence, especially where there has been no conviction? In *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978), the refusal, upon defense request, to inform the jury about the presumption of innocence was held to have violated due process. Justice Powell, writing for the *Taylor* Court, noted:

> While the use of the particular phrase "presumption of innocence"—or any other form of words—may not be constitutionally mandated, the due process clause of the 14th Amendment must be held to safeguard "against delusion of the principal that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, *supra*, 425 U.S. at 503, 96 S.Ct. at 1693.

It has been held that the presumption of innocence is a due process requirement. *See Bentley v. Crist*, 469 F.2d 854, 855 n.2 (9th Cir. 1972). It seems readily apparent

that the presumption of innocence is not encompassed in a sentencing hearing where the sentencing hearing becomes, in essence, "the real trial." *See Rodriguez, supra.*

Petitioner submits that the magnitude of the difference between a sentence of 7 to 9 years and a sentence of 28 years without the possibility of parole is surely the type of disparity which requires a heightened standard of review. The effect here is to permit the highest penalty possible to be imposed, not for conduct determined by the jury, but for conduct determined by the court at sentencing without the usual procedural protections such as the requirement of proof beyond a reasonable doubt, or even by clear and convincing evidence. The Court has yet to review a case which specifically addresses the due process considerations applicable to a standard of proof for sentencing like the one at issue here. It is respectfully urged that, with increasing numbers of such sentences being imposed in Federal district courts around the country and in view of the lack of an explicit standard of proof under the sentencing guidelines, the Court should now establish the standard of proof which must be employed.

CONCLUSION

For all the reasons stated herein, Petitioner Louis Marino respectfully requests that the Court grant his Petition for Writ of Certiorari and review the opinion and judgments issued by the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008, 93-3434, 93-3435, 93-3513, 93-3514, 93-3515, 93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DIDOMENICO, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 87—**Ann Claire Williams**, *Judge.*

ARGUED OCTOBER 31, 1995—DECIDED MARCH 1, 1996

Before POSNER, *Chief Judge*, and CUDAHY and COFFEY, *Circuit Judges.*

POSNER, *Chief Judge.* The Chicago Outfit (the "Outfit," the "Mob," the "Mafia")—the criminal enterprise whose most notorious boss was Al Capone—operates through "street crews." The twenty defendants in this mainly RICO case that charges predicate acts of extortion, bribery, murder, and other offenses were members of the Ferriola Street Crew, named after its boss from 1979 to his death in 1989, Joseph Ferriola. Ferriola was succeeded by defendant Infelise. The Ferriola Street Crew engaged

in the usual "Mob" activities, in particular the protection racket (the collection of "street tax" from brothels, gambling enterprises, and other illegal businesses), loan sharking, and bookmaking, with bribery of police, judges, prosecutors, and other public officials, subornation of jurors, and the occasional murder thrown in to protect and enforce its reign of terror. The focus of the prosecution was on the street crew's efforts to collect street tax from "independent" bookmakers, which is to say bookmakers not affiliated with the "Mob," in the suburbs north of Chicago, primarily during the 1980s. These efforts included the murder of a bookmaker named Hal Smith. The evidence of the defendants' participation in these activities was overwhelming, except that the evidence of their participation in the murder depended critically on the testimony of a turncoat member of the street crew, William Jahoda. Smith had angrily refused a demand relayed to him from defendant DeLaurentis to pay street tax, saying "fuck the little guinea." Infelise directed Jahoda to lure Smith to Jahoda's home, which he did, arriving in Smith's car. Jahoda told Smith to enter the house through the garage, while Jahoda pretended to pick up his mail. Shortly afterward, through the open door to the kitchen, Jahoda saw Smith lying dazed but conscious on the kitchen floor. Infelise drove Jahoda back to the tavern where he had met Smith and told him to burn his clothes. When Jahoda returned home later that night, he found that the kitchen floor had recently been mopped up. Infelise called and told him to look for Smith's cigar and glasses, which the murderers thought they might have left there. Jahoda did not find the items. Smith's body was found a few days later in the trunk of his car. He had been tortured and then strangled.

The defendants were tried together and found guilty of most of the counts of the indictment and received long prison sentences which in the case of some of the defendants, given their age, are the equivalent of life in prison. Their appeals, which we have consolidated, present sixteen separate grounds. We shall confine our discussion to

those that have arguable merit, disregarding such frivolous ones as that the judge could not sentence the defendants to terms of years that were (because of the defendants' age) the practical equivalent of life in prison without a jury recommendation, as required by 18 U.S.C. § 34 as it read when they were sentenced. Section 34 applies only to convictions for crimes punished by the chapter of the federal criminal code in which the section appears (mainly arson resulting in the destruction of aircraft or motor vehicles), and none of the defendants was convicted of any such crimes. It didn't help, though, that in response the government, overlooking *United States v. Prevatte*, 66 F.3d 840, 843-44 (7th Cir. 1995), argued that a term of years, however long, and however old the defendants are, is not within the scope of section 34. We held the contrary in *Prevatte* and in *United States v. Martin*, 63 F.3d 1422, 1432-34 (7th Cir. 1995).

The most dramatic issue and the one pressed hardest by the defendants arises from the bugging of a room in the Metropolitan Correctional Center, the federal jail in Chicago. The room had been set aside for the use of the defendants, who were being detained in the jail awaiting trial, in meeting with their lawyers. Someone made a tape recording of a conversation between one of the defendants and his lawyer and sent the tape to the lawyer. The defendants argue that the district judge should have conducted an evidentiary hearing to determine the extent of the bugging and whether it had given the prosecution information about defense strategy that the prosecution had used to undermine the defense at trial.

The lawyer gave the tape to the government, which began an investigation to determine who had bugged the room. The FBI interviewed almost 150 people, including the defendants, their lawyers, the prosecutors, and employees of the jail. The report of the investigation, which was submitted in camera to the district judge (and which we have read as well), indicated that the investigation had been totally inconclusive. Although visitors to the MCC are supposed to be screened for tape recorders, security

was lax during 1991, when the bugging incident occurred, as we know from the El Rukns cases. See, e.g., *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995). A tape recorder may have been smuggled in to one of the defendants by a visitor, or even carried in by one of the defendants' lawyers. A guard at the MCC might have been in the pay of the defendants (there was evidence at trial that at least one federal officer was in the pay of the Ferriola Street Crew) and made the tape in an effort to embarrass the prosecution. Or, as the defendants conjecture, the prosecution itself may have bugged the meeting room to find out what discreditable information the defendants knew about Jahoda, a key prosecution witness. Of course the prosecution would not have sent the tape of its illegal bugging to the lawyer for one of the defendants, but maybe an MCC guard sympathetic to the "Mob" found the tape and mailed it to the lawyer.

The government argues that the defendants did not lay a foundation for an evidentiary hearing on the matter because they presented no evidence that the bugging altered the result at trial—no evidence that the prosecution was privy to the bugging or, if it was, used the information gleaned from it to undermine the defense or if it did caused innocent people to be convicted of heinous crimes. We do not consider this a sound argument. It pushes the notion of harmless or nonprejudicial error too far. The principle that an acquittal or a new trial is not a proper remedy for governmental misconduct, that the defendant must show that the misconduct may have caused the jury to convict him, is sound but like most legal principles cannot be maintained without qualification. Otherwise the prosecution could send a defendant to prison without any judicial process whatsoever and if he complained defend by showing that had the defendant been tried with assistance of counsel and all the other trimmings of modern criminal procedure he would surely have been convicted and sentenced to a term of years at least as long as the prosecution proposes to hold him. The counterprinciple that defeats this result is that denial of the right to counsel (not the right to competent counsel, but the more basic

right to *some* counsel) or of any other fundamental rights of criminal defendants (such as the right to an impartial judge or to trial by jury) is reversible error even if not shown to be prejudicial—even if shown to be completely harmless. E.g., *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

We put to the government at oral argument the following example. The government adopts and announces a policy of taping *all* conversations between criminal defendants and their lawyers. It does not turn the tapes over to the prosecutors. It merely stores them in the National Archives. The government's lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree, although for a reason that will become apparent shortly we need not attempt to resolve the issue definitively. The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.) And yet it would be impossible in any given case to show that the outcome had been changed by the practice. *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *United States v. Perry*, 857 F.2d 1346, 1349-50 (9th Cir. 1988). At the other extreme are cases of ad hoc governmental intrusion into the relation between a criminal defendant and his lawyer, falling far short of continuous surveillance. In such cases harm to the defense must be shown because the bare fact of the intrusion does not create a high probability that communication between lawyer and client or between client and lawyer was dis-

rupted. *United States v. Morrison*, 449 U.S. 361 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4, 558 (1977); *United States v. Castor*, 937 F.2d 293, 297-98 (7th Cir. 1991); *Clark v. Wood*, 823 F.2d 1241, 1249-50 (8th Cir. 1987); *Sinclair v. Schriber*, 916 F.2d 1109, 1113 (6th Cir. 1990).

Our case may seem closer to the first pole than to the second. The bugging was discovered before the trial and from then on the defendants and their lawyers must have wondered whether their conversations were being overheard, even though the district judge promptly authorized the defendants to meet with counsel outside of the jail; and conceivably this fear might have prevented effective communication between client and lawyer, emptying the right to the assistance of counsel of much of its meaning. Cf. *United States v. Cronic*, 466 U.S. 648, 659-60 (1984); *United States v. Berkowitz*, 927 F.2d 1376, 1381 (7th Cir. 1991). "Free two way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978); see also *Geders v. United States*, 425 U.S. 80, 91 (1976). The defendants do not argue, however, that the effect of the natural anxiety of themselves and their lawyers concerning the confidentiality of their conversations was sufficient to warrant a new trial or perhaps—since it is not obvious how a new trial would dissipate the anxiety—even the dismissal of the indictments with prejudice. Such an argument would be unlikely to succeed when so far as appears the bugging incident was completely isolated (and isolated intrusions into the attorney-client relation are, as we have seen, not reversible error per se) and the bug may have been planted by one of the defendants. In any event the argument is not made. All the defendants argue for is an evidentiary hearing to get to the bottom of the matter. In light of the report of the FBI investigation it is unlikely that such a hearing would get us nearer to the heart of the mystery. But the defendants are understandably reluctant to defer to a report they

have not seen compiled by an agency that they suspect or at least affect to suspect of being responsible for the very crime that it was investigating.

The defendants' request is a reasonable one but it comes too late. The district judge offered them an evidentiary hearing, directed the government to furnish them with a list of all the employees of the MCC who had had access to the meeting.room, and gave the defendants' lawyers subpoena power to compel the presence of witnessses at the hearing. The hearing was scheduled for September 23, 1991, a week before the scheduled opening of the trial. Shortly before the hearing was to take place, the defendants requested more time to complete their investigation. The hearing was repeatedly postponed at the defendants' request. During the delay the government submitted affidavits from all the members of the prosecution team, attesting their lack of complicity in the bugging. Finally on July 16, 1992, almost ten months after the original date set for the hearing and four months after the jury had returned its verdict, the defendants moved for an evidentiary hearing. After reviewing the FBI report, and noting that despite a lengthy investigation the defendants had come up with no evidence to suggest that the government was implicated in the bugging, the judge denied the motion. At no time during this entire period—which did not end until May 23, 1994, when the judge denied the defendants' last request for access to the FBI report—did the defendants submit the tape to the judge.

In these circumstances we cannot say that the judge abused her discretion in declining to order an evidentiary hearing. A critical consideration is the government's affidavits. Although evidentiary hearings in criminal cases are not governed by the Federal Rules of Civil Procedure, the provisions of those rules relating to summary judgment are applicable by analogy. *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985); cf. *United States v. Randle*, 966 F.2d 1209, 1212 (7th Cir. 1992); *Castillo v. United States*, 34 F.3d 443, 445-46 (7th Cir. 1994). In opposing the evidentiary hearing sought by the defendants the gov-

ernment was in a position analogous to that of a movant for summary judgment who argues that no genuine issue of material fact exists and therefore that summary judgment should be granted. A fundamental principle of summary judgment that we think ought to be applied in cases such as this in which the issue is whether to hold an evidentiary hearing is that if the proponent supports his motion with affidavits, the opponent must counter the motion with his own affidavits (or equivalent materials, which is to say materials having the quality of evidence). By submitting affidavits the government shifted to the defendants the burden of submitting counteraffidavits that would show there was an issue that only an evidentiary hearing could resolve. The defendants did not take up the burden although they had many months to do so.

Against this it can be argued, in accordance with our earlier discussion, that even if the prosecution team was not complicit in the bugging, the defendants' right to counsel may have been infringed. It is one federal government after all. If the director of the MCC ordered the bugging, there would be a serious issue of the infringement of that right even if the fruits of the bugging were not turned over to the prosecutors. And on that issue the affidavits did not bear at all. But throughout these proceedings, up to and including the appeal, the defendants have accepted that they must show, if not prejudice to their defense, if not likelihood of acquittal had the bugging not taken place, at least potential prejudice and for that they would have to show that the prosecution received, directly or indirectly, valuable information from the bugging. This the prosecution denied by affidavit—denied that it had received *any* information from the bugging—and the inability of the defendants, though granted ample time and resources, to come up with counteraffidavits dooms their challenge to the denial of an evidentiary hearing. Had the defendants not sought to postpone the hearing first offered them by the district judge, they would have had their hearing. They gambled on having a better hearing if given more time to investigate, but the gamble failed when the

investigation turned up nothing, and they must be held to their tactical decision.

In short, the defense could have (1) argued that no showing of prejudice was required or (2) presented some evidence of prejudice. By doing neither, the defense forfeited their claim to an evidentiary hearing. We do not think that we are being overtechnical in so concluding, especially since, given the inconclusiveness of the FBI's investigation, the likelihood that an evidentiary hearing would get to the bottom of the bugging incident is remote.

The defendants raise two issues concerning the jury. The first is whether the judge abused her discretion in empaneling an anonymous jury, that is, in refusing to reveal the names and addresses of the jurors to the parties. A juror's name and address are information potentially valuable to a party in deciding whether to challenge a juror either for cause or by the use of a peremptory challenge. The juror might turn out to be related to a party or a witness (yet not disclose this on voir dire) or to live in a neighborhood whose residents have demographic characteristics predictive of their likely response to the issues in the case. There is skepticism in some quarters about the ability of lawyers, even when aided by pricey consultants, to pick favorable jurors; but so long as we have challenges for cause and peremptory challenges the objection to anonymous jurors that it deprives the lawyers of information essential to their exercise of a valued procedural right cannot be rated as negligible. But we think the district judge acted within her discretion (see *United States v. Crockett*, 979 F.2d 1204, 1215 (7th Cir. 1992); *United States v. Paccione*, 949 F.2d 1183, 1192 (2d Cir. 1991)) in deeming the right overridden in this case by the fear of jurors to be identified to the Chicago Outfit and by the danger that they might be bribed. Intimidation in general, and bribery of public officers connected with the criminal justice system (and jurors of course are ad hoc public officers of that system—are in fact lay judges) in particular, are specialties of the Outfit. This is not a case, like *United States v. Vario*, 943

F.2d 236, 241 (2d Cir. 1991), in which the defendants are rumored to have "Mob" connections. The defendants *are* the "Mob." We add that the anonymity of the jury hurt the prosecution as well as the defense, since the prosecution too has and frequently exercises the right to challenge jurors for cause or to exercise peremptory challenges. The judge's ruling may not have altered the balance of advantages between prosecution and defense.

The other jury issue relates to an inconsistency in the verdict regarding defendant DeLaurentis. He was accused of participation in the conspiracy to murder the bookmaker Hal Smith in two different counts of the indictment. The jury found him not guilty of that participation in one of the counts (Count One) but guilty in the other (Count Eight). The poll of the jury did not illuminate the discrepancy, as each juror indicated that the verdict was correct. On the day after the verdict was rendered, however, one of the jurors stated on a local news program that the jury had *not* voted DeLaurentis guilty of conspiracy to murder in Count Eight. This led the judge to interview the jurors, a week later, in the presence of counsel. The judge ascertained that the jury had indeed intended to acquit DeLaurentis of both counts of conspiracy to commit murder. But she refused the defendants' request that she ask the jurors whether they had made any other mistakes in filling in the verdict form.

Again we think the judge acted within the scope of her discretionary authority. There was no indication of any other mistake in the verdict. The interviews took place a week after the verdict and the jurors no longer had their notes of what had gone on in the jury room. It is not clear what line of questioning might have identified another error on the verdict form. Although not permitted to inquire into the deliberative process itself—the discussion or thoughts or votes of the jurors, Fed. R. Evid. 606(b)—the judge is permitted to inquire whether the verdict represents the actual decision of the jury. *Continental Casualty Co. v. Howard*, 775 F.2d 876, 885 (7th Cir. 1985); *Plummer v. Springfield Terminal Ry.*, 5 F.3d 1

(1st Cir. 1993). But this right of inquiry must be conducted with due regard for the policy that underlies Rule 606(b). Jurors are conscripts, taken away from their jobs or other activities sometimes for months at a time (the trial in this case lasted four and a half months) and enlisted in the justice system for meager pay, here to try dangerous men who are members of a gang capable of retaliation against jurors. To embarrass or harass these jurors by protracted questioning about their deliberations would be a disservice to the jury system, which can hardly thrive if jurors are sullen and resentful as a result of being abused by judges and lawyers. The line is drawn between determining whether the verdict is true in the sense of an accurate statement of the jury's decision and rational in the sense of intelligent and deliberated. *Id.* at 4; *Continental Casualty Co. v. Howard*, *supra*, 775 F.2d at 885-86; *Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989). The defendants ask us to cross the line. There was no reason to believe that the verdict contained other clerical errors. A march through the verdict in search of them would inevitably have become an inquest on the character of their deliberations.

The two jury issues raised by the defendants thus turn out to be linked by their common potential for imperiling the jury system by undermining the protection of jurors from threats to their safety and dignity.

There is an issue relating to the instructions. After the trial in this case the Supreme Court, in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), held that the issue of materiality, in a prosecution under 18 U.S.C. § 1001 for making false statements to federal agencies, is one of fact, not law, and is therefore for the jury to determine. In our case the judge said to the jury, with respect to the charges of violations of the Internal Revenue Code made in the indictment against several of the defendants, "I instruct you as a matter of law that understatement of 'total income' is a material matter." The provisions of the Internal Revenue Code under which these defendants were charged, however, 26 U.S.C. §§ 7206(1) and (2),

punish false or fraudulent statements with respect to *material* facts, thus bringing the principle of *Gaudin* into play. These defendants would therefore be entitled to a new trial on the tax counts had they raised the issue in the district court. Since they did not, they can prevail only if the error in the instructions was a plain error, and for the reasons stated in the concurring opinion in *Gaudin*, 115 S. Ct. at 2322, and in our recent opinion in *United States v. Ross*, No. 92-1449, slip op. at 12-17 (7th Cir. Feb. 2, 1996), we believe that it was not.

Jahoda testified to a number of conversations that he had had with defendant Bellavia in 1989, concerning the murder of Smith five years earlier. For example, in a plain allusion to the murder, Bellavia told Jahoda, "You know, when them things happen, I just, when they're done, they're done. . . . I blank 'em out. . . . Sometimes you got to get it out in the open and you feel better, and you can put it to bed once and for all. You know, it's done and gone, forget about it." In the same vein he told Jahoda, "Forget about it. You know, it's gone. . . . [Y]ou never do something with . . . anybody you're going to worry about in the future. Forget about it. You know, it's gone. The day it was over, it was over. It's forgotten. That was the end of it." These statements, though hearsay, were admitted into evidence against the other defendants as having been made in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Against Bellavia himself, they were uncontroversially admissible as the admissions of a party. Fed. R. Evid. 801(d)(2)(A). But the principle that allows the admission of conspirator X to be treated as the admission of defendant conspirator Y, usable against Y as the admission of a party provided that the statement is made in furtherance of the conspiracy, disquiets those who believe that the concept of conspiracy gives prosecutors too much power. The rationalization for the principle is that conspirators are each others' agents (and therefore principals), and the principal is bound by the agent's words and deeds, provided they are within the scope of the agency, so that an admission by one is

an admission by all and can be used against all as "their" admission.

This translation of commercial principles of agency into the law of evidence is one of the less impressive examples of what Coke called the "artificial reason" of the law. The concern behind the hearsay principle is with the reliability of evidence rather than with the facilitation of enterprise—and anyway the law of conspiracy is designed to discourage rather than to facilitate enterprise. Because a statement to be admissible as the statement of a party need not have been against interest when made (or at any time for that matter), *Huff v. White Motor Corp.*, 609 F.2d 286, 292 and n. 7 (7th Cir. 1979); 2 *McCormick on Evidence* § 254, p. 143 (4th ed., John William Strong gen'l editor, 1992), the admissibility of such a statement cannot convincingly be grounded in the presumed trustworthiness of a statement that is against the utterer's self-interest to give. E.g., 2 *id.*, p. 141; *United States v. Pallais*, 921 F.2d 684, 687-88 (7th Cir. 1990). The standard justification of its admissibility is a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements. E.g., *United States v. Chappell*, 698 F.2d 308, 312 (7th Cir. 1983); 2 *McCormick on Evidence*, *supra*, p. 141. It has, it seems to us, rather little force as applied to the admissibility of coconspirator's statement. *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); Comment, "Reason and the Rules: Personal Knowledge and Coconspirator Hearsay," 135 *U. Pa. L. Rev.* 1265, 1272-73 (1987). About all that can be said in favor of the rule is that since the statements of agents of legitimate enterprises are imputed to the enterprise through the operation of the law of agency on the party-admission rule, illegitimate enterprises, such as criminal conspiracies, should not receive more favorable treatment.

Whatever the justification for the rule—and there may be none—its dependence on agency principles makes the scope of the conspiracy critical. And a conspiracy, and a conspiracy to conceal an earlier, completed conspiracy, are two different conspiracies, like two different firms, and

statements made in furtherance of the second, the cover-up conspiracy, are therefore not admissible in evidence to demonstrate participation in or the acts of the first conspiracy. *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949); *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991); *United States v. Xheka*, 704 F.2d 974, 985 (7th Cir. 1983). But this is not such a case. Hal Smith was killed as part of the overall conspiracy to extract street tax from the independent bookmakers in the area worked by the street crew. The conspiracy was still going on when Bellavia, in an effort to prevent its unraveling, made his reassuring statements to Jahoda. Statements designed to prevent a conspiracy from collapsing are not to be equated to statements designed to cover up a finished conspiracy. In the first case unlike the second there is only one conspiracy; the statements are made in an effort to shore it up and keep it going; they are therefore admissible against the conspirators. *United States v. Marin*, 7 F.3d 679, 690 (7th Cir. 1993); *Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989); *United States v. Mason*, 658 F.2d 1263, 1270 (9th Cir. 1981).

The remaining issues that require discussion all relate to sentencing. Defendants Bellavia, Infelise, and Marino object vigorously to the fact that the judge in determining their sentences found that their conduct had included a conspiracy (nested within the overall RICO conspiracy) to murder Hal Smith, even though the jury either acquitted or hung on the counts that charged these defendants with participation in that conspiracy. The issue of their participation was before the jury, they argue, and in finding guilt where the jury did not the judge usurped the jury's function. This is wrong. The jury was asked to decide whether there was proof of the defendants' guilt beyond a reasonable doubt, whereas the issue in sentencing is whether the defendants' guilt is shown by a preponderance of the evidence, a lower standard, so that the failure of the proof to satisfy the first standard doesn't show that it fails to satisfy the second. *United States v. Jones*, 54 F.3d 1285, 1294 (7th Cir. 1995); *United States*

v. Chandler, 12 F.3d 1427, 1434-35 (7th Cir. 1994). Otherwise you couldn't have a tort suit for wrongful death as the sequel of the defendant's acquittal, which of course you can.

We acknowledge the growing concern that defendants in the federal courts are being sentenced for crimes that they were adjudged guilty of only under the civil standard. *United States v. Ebbole*, 917 F.2d 1495, 1496 (7th Cir. 1990). The government could not persuade the jury to convict these three defendants of conspiracy to murder Hal Smith but they were sentenced for the crime anyway. The principle exploits the traditional indifference of reviewing courts to the length of a sentence within the bounds fixed by the statute under which the defendant was convicted. Although two members of this court have recently expressed tentative support for requiring, as a matter of the federal common law of criminal procedure, proof by clear and convincing evidence of facts presented at the sentencing hearing in justification of a markedly higher sentence than the facts found at trial, *United States v. Rodriguez*, No. 94-2080, slip op. at 3 (7th Cir. Jan. 4, 1996) (dissent from denial of rehearing en banc), that is neither the present view of a majority of the judges nor a position urged by the defendants in this case.

DeLaurentis was sentenced to 222 months in prison, although his base offense level after various adjustments other than the one in issue was only 33, for which the guidelines range is 135 to 168 months. The judge raised the sentence far above that range by making an upward departure on the basis of the large number of crimes committed by DeLaurentis that had been counted neither in the base offense level nor in his criminal history (he had, in fact, no significant criminal history). The reason for the departure was that the base offense level is "topped off" at five "units" (which in this case equates to crimes). U.S.S.G. § 3D1.4; *United States v. Dawson*, 1 F.3d 457, 459 n. 2 (7th Cir. 1993). DeLaurentis had actually committed at least 22 crimes, of which 6 would get him to the 5-unit top. Since all 22 crimes were committed in furtherance of the RICO conspiracy, they were conduct re-

lated to the offense of conviction rather than (as in *United States v. Dawson*) being a part of the defendant's criminal history. Judge Williams divided the number of uncounted crimes by 5 in order to yield additional base levels, resulting in the punishment bonus of which the defendant complains. We do not understand the defendant to be arguing that the divisor was too small. The choice of the divisor is an exercise of judgment that an appellate court will not disturb unless it exceeds the bounds of reason. *United States v. Chase*, 894 F.2d 488, 491-92 (1st Cir. 1990); but cf. *United States v. Pearson*, 911 F.2d 186, 190-91 (9th Cir. 1990).

The argument, rather, is that the grouping provision (section 3D1.4) is limited to convicted crimes (or to stipulations of crimes). U.S.S.G. ch. 3, pt. D, introductory comment; *United States v. Dawson, supra*, 1 F.3d at 463; *United States v. White*, 888 F.2d 490, 496 (7th Cir. 1989); *United States v. Paccione*, 949 F.2d 1183, 1205 (2d Cir. 1991); *United States v. Blanco*, 888 F.2d 907, 909-10 (1st Cir. 1989). Unconvicted, unstipulated crimes may not be used for a departure based on that section. *United States v. Dawson, supra*, 1 F.3d at 463. Only 13 of DeLaurentis's 22 crimes were ones of which he had been convicted. So his punishment bonus under section 3D1.4 should have been only 2 at most ($13 - 6 = 7$, $7 \div 4 = 2$), rather than the 3 that the judge gave him. There may be other grounds for an upward departure, see U.S.S.G. § 5K2.0; *United States v. Dawson, supra*, 1 F.3d at 465; *United States v. Uccio*, 940 F.2d 753, 759 (2d Cir. 1991), but that is something for Judge Williams to consider when resentencing DeLaurentis.

The last issue we need discuss concerns the denial of defendant Sarno's motion to vacate his plea agreement on the ground that the district judge gave him a much heavier sentence than the agreement contemplated. The agreement specified a guidelines range of 46 to 57 months and in fact he was sentenced to 78 months. But there was no violation of the agreement, which stated that the guideline calculations in it "are preliminary in nature and sub-

ject to revision by the Court." The calculations turned out to be in error and were corrected by the judge. Sarno explicitly assumed the risk of such an error, and has only himself or possibly his lawyer to blame. He could have refused to sign the plea agreement unless it specified that it could be rescinded if the judge went outside the guidelines range set forth in it. Fed. R. Crim. P. 11(e)(1)(C), (e)(4); *Carnine v. United States*, 974 F.2d 924, 930-31 and n. 8 (7th Cir. 1992); *United States v. Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986).

DeLaurentis is entitled to be resentenced. With this exception, the judgments are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: March 1, 1996

BEFORE:

Honorable Richard A. Posner, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable John L. Coffey, Circuit Judge

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008, 93-3434, 93-3435, 93-3513, 93-3514, 93-3515, 93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM DIDOMENICO, also known as BILLY D; HARRY ALEMAN, PAUL SPANO, et al.,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 CR 87, Ann Claire Williams, Judge

The judgment of the District Court is AFFIRMED, with the exception of Defendant DeLaurentis who is entitled to be resentenced, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1996

Before

Hon. Richard A. Posner, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge

Nos. 93-1134, 93-1135, 93-1136, 93-1604, 93-2008, 93-3434, 93-3435, 93-3513, 93-3514, 93-3515, 93-3516, 94-1831, 94-3341

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM DIDOMENICO, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 87, Ann Claire Williams, Judge.

ORDER

Petitions for rehearing and suggestions for rehearing en banc have been filed on behalf of all appellants, followed by the filing of a petition for rehearing by the appellee. All the judges on the original panel have voted to deny the petitions, and none of the active judges has requested a vote on the suggestions for rehearing en banc. The petitions are therefore DENIED.

APPENDIX C

[Dated July 22, 1993]
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 90 CR 87
	)	
LOUIS MARINO	)	

MEMORANDUM OPINION AND ORDER

The jury found defendant Louis Marino guilty on Counts 1, 2, and 18 of the indictment.[1] With respect to Count 1, the jury found Marino guilty of Unlawful Debts 2 and 5, and Racketeering Acts 5(a)-(b), 6-7, 9(a), 10(a)-(b), and 11(a)-(b).[2] The jury could not reach verdicts on Racketeering Acts 17(a)-(b), and Counts 8-9.[3]

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[1] Count 1 charged Marino with racketeering conspiracy in violation of 18 U.S.C. § 1962, Count 2 charged him with illegal gambling conspiracy in violation of 18 U.S.C. § 371, and Count 18 charged him with submitting false and fraudulent tax returns in violation of 26 U.S.C. § 7206.

[2] Unlawful Debts 2 and 5 charged Marino with the unlawful collection of money from Henry Erfurth and Steve Walton. Racketeering Acts 5(a)-(b) charged Marino with running illegal sports gambling and parlay card bookmaking operations. Racketeering Act 6 charged him with the extortion of Kenton Pielet. Racketeering Act 7 charged him with running an illegal casino gambling operation. And, Racketeering Acts 9(a), 10, and 11 charged Marino with the extortions of Ken Eto, Patrick Gervais, and George Miller, Jr.

[3] Racketeering Acts 17(a)-(b) charged Marino with conspiring to murder and murdering Hal Smith. Counts 8-9 charged Marino with conspiring to murder and murdering Hal Smith.

This case is currently before the court on Marino's and the government's objections to the PSI, Marino's objection to the retroactive application of federal sentencing guidelines, and the government's motion for upward departure. For the reasons stated below, this court finds that Marino's total adjusted offense level is 43, his criminal history category is 1 and his guideline sentence is life in prison. Since none of the counts for which Marino was convicted bear a maximum penalty of life imprisonment, this court will impose consecutive sentences on all counts to best effectuate this sentence. Given the length of this opinion, this court has provided an index.

*Index**

I. Background

A. Overview of the Ferriola Street Crew's Illegal Activities

1. Illegal Gambling Operations 5

2. The Collection of Unlawful Debts 9

3. Payoffs and Bribes 11

4. Hal Smith's Murder 17

B. Defendant Marino's Role in the Ferriola Street Crew 24

II. Objections to the PSI and the Government's Motion for Upward Departure

A. Section 3C1.1: Obstruction of Justice

1. Hal Smith's Murder 38

2. Payment of Hush Money to Robert Covone 47

3. Police Protection for Patrick Gervais 49

B. Section 3B1.1(b): Crew Supervisor or Manager 55

C. Section 5K2.0: Upward Departures 57

1. Hal Smith's Murder 58

2. Participation in Organized Crime 66

3. Defendant's Ex Post Facto Objection to Upward Departures 69

4. Summary 72

* [Index pagination is District Court's original pagination.]

D. Objections to Statements in the PSI

1. Section 3E1.1: Acceptance of Responsibility 73

2. Factual Inaccuracies in the PSI 75

E. Base Offense Levels for Racketeering Acts 6, 9(a), and 10(a) 89

F. Base Offense Levels for Racketeering Acts 11(a)-(b) 90

G. Further Objections to Statements in the PSI 91

H. Objections to the Government's Version of the Offense 93

1. Extortion of Thomas Skryd 95

2. Extension of Juice Loan Bankroll to James Basile 99

3. Other Objections to Statements in the Government's Version of the Offense 107

I. Base Offense Level for Racketeering Act 10 108

J. Relevant Conduct 109

1. Extension of Juice Loan Bankroll to Dominic Basso 110

2. Extension of Juice Loan Bankroll to Mike Pascucci 111

3. Extension of Juice Loan Bankroll to James Nicholas 114

K. Summary 116

Background

A. *Overview of the Ferriola Street Crew's Illegal Activities*

This case involves the illegal activities of one operating unit of the Chicago Outfit or mob known as the Ferriola Street Crew. This crew existed primarily to provide income to its members through: (1) the operation of various illegal gambling businesses such as sports bookmaking, parlay cards, and casino games, (2) the collection of "juice" or interest on usurious loans made by the crew, (3) the collection of "street tax" or money from individuals engaged in illegal or quasi-illegal businesses, and (4) the use of these proceeds in the criminal enterprise and other business ventures.[4] To conceal their actions, the crew also provided monetary payments to crew members who refused to testify against the crew, instructed potential grand jury witnesses to lie, and attempted to and bribed various police officers, judges, and other political officials.

From 1979 through the indictment in this case, the Ferriola Street Crew was involved in several illegal gambling businesses including a sports bookmaking business, two parlay card businesses from 1979 through 1983, floating blackjack games, and a casino. DeLaurentis also operated gambling rooms in 1982 and a floating dice-game from 1986 through 1989 on behalf of the crew.

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[4] Not all defendants convicted in this case participated in each of the crew's illegal activities. Several were involved solely or primarily in the crew's gambling operation. However, each defendant benefited directly and financially from the crew's use of and reputation for violence. For example, competition against the crew's gambling operation was controlled by violence, threats of violence, and intimidation.

From 1976 through 1979, defendant William Jahoda operated a sports bookmaking business with Sam Sammarco. In early 1979, Jahoda told Sammarco that he wanted to switch to another bookmaking group and later told Sammarco that he would be working with Infelise. Shortly thereafter, Jahoda had several meetings with Infelise regarding setting up a bookmaking business. In the spring of 1979, Jahoda and representatives of the Ferriola Street crew agreed to form a bookmaking partnership by which profits would be split evenly between Jahoda, Infelise, and the crew. Jahoda was given responsibility for the day-to-day operation of the gambling operation including supervision of the wirerooms. Jahoda reported to Infelise on almost a daily basis regarding daily operations. This partnership continued until 1988 and generated profits of approximately $8 million.

In 1988, Jahoda was arrested twice for operating illegal blackjack games for the crew. As a result, Infelise replaced Jahoda with DeLaurentis, who became a partner and assumed responsibility for the day-to-day management of their gambling operation.[5] Defendant William DiDomenico acted as DeLaurentis' principal assistant. Jahoda remained involved in the business as a 50/50 bookmaker.[6]

Many other defendants were involved in the sports bookmaking business. For example, Bellavia was a col-

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[5] Prior to this appointment, DeLaurentis acted, at various times, as an agent, a collector, a 50/50 bookmaker, and a wireroom and collections supervisor for the crew.

[6] 50/50 bookmakers provided the crew with players and agents, and shared equally in the profits and losses generated by their players and agents.

lector and a supervisor for the operation. He also supervised the bookmaking activities of Freddie Braun. Marino started as an agent[7] and later became a collections supervisor. Marino also supervised the bookmaking activities of Homer Gonzalez for the crew. Michael Zitello acted, at various times, as an agent, 50/50 bookmaker, wireroom clerk, manager, and collector. Robert Covone, Ronald DeRosa, and Frank Maltese were agents, James Coniglio was a 50/50 bookmaker and a collector, James Nicholas was a 50/50 bookmaker, and Thomas McCandless and Robert Garrison were 50/50 bookmakers and wireroom clerks. Paul Spano permitted his business, Flash Interstate Delivery System, Inc. ("Flash Trucking") to be used as a meeting place and operations center for the business. He also kept money at Flash for use in the crew's bookmaking business.

From 1979 through 1983, the crew operated a parlay card business. This operation was initially operated by Infelise, Marino, DeLaurentis, Jahoda, and George Miller. During this time, parlay cards were distributed through agents. In the early 1980's, DeLaurentis attempted to take over all the parlay card businesses in Lake County, Illinois. During the business' later period, it was operated by Infelise, Jahoda, DeLaurentis, Michael Sarno, James Damopoulos, and others. Sarno provided the parlay cards for distribution.

From 1986 through 1988, the crew also operated a floating blackjack game managed by Jahoda under

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[7] Agents controlled and directed bettors to the crew's gambling operation, and collected losses and paid winnings to their bettors for the crew. Agents received a commission of 25 % of the net losses of their bettors.

Infelise's supervision. Bellavia, Garrison, Nicholas, and Damopoulos acted as agents for this game. The blackjack games' net profits were split equally between Infelise, Jahoda, Ferriola, and Chuck Burge. The games were rigged through the use of professional card cheats and mirrored shoes. In total, approximately 24 floating blackjack games were held and nearly $1 million in profits was generated.

And, in the spring and summer of 1982, the crew operated a casino in a house in Libertyville, Illinois known as the Rouse House. The casino was managed by Jahoda under Infelise's supervision. The casino had rigged blackjack and craps games. Marino, DeLaurentis, McCandless, and Zitello worked at the casino, and DeLaurentis, McCandless, Zitello, and others provided players for the games. Casino profits were split equally between Infelise, Jahoda, Ferriola, and the crew. During its operation, the casino generated approximately $500,000 in profits.

The Ferriola Street Crew also collected unlawful debts, including gambling debts from losing bettors and interest and principal payments on juice loans. Interest on juice loans varied from 10% per month to 10% per week. Losing bettors who were unable to pay their gambling debts often were given juice loans for the balance of their gambling debts.[8] The crew also provided bankrolls to crew

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[8] The crew collected unlawful debts from Curt Bullock, Henry Erfurth, Roy Salerno, Steve Walton, Les Perrelli, Angelo Parhas, Tony Belville, Edward Muisenga, Nick Gerodakis, James Wolf, Jack Duff, and Thomas Piccietti.

Parhas, Belville, and Gerodakis were given juice loans when they could not pay off their gambling debts. Covone arranged for Ed Muisenga to receive a juice loan from a non-crew mem-

(continued...)

members and other from which to make juice loans and from which the crew received a percentage of the money obtained.[9]

Beginning in approximately 1974, the crew also sought to control all independent sports bookmaking businesses, particularly in northern Cook, Lake, and McHenry Counties, Illinois.[10] The crew forced independent bookmakers to either pay the crew a monthly street tax, make the crew a partner in their bookmaking business, or get out of the business. Partnerships were usually 50% partnerships by which the crew and the bookmaker would share profits and losses on a 50/50 basis.

In the late 1970's and early 1980's, the crew expanded. this operation to include collecting street tax from houses of prostitution and adult book stores. During the early 1980's, the crew also attempted to take over independent parlay card gambling businesses and independent high stakes card games. Violence or the threat of violence was

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[8] (...continued)

ber to pay off his gambling debt to the crew. Les Perelli and Nick Koritsaris received juice loans from DeLaurentis separate from any gambling debts. Undercover agent Larry Weeks also received a juice loan from Infelise and DeLaurentis to bribe a Wisconsin public official.

[9] For example, Marino provided juice bankrolls to Mike Pascucci and Nicholas, and made juice loans to bookmaker Dominic Basso. Infelise and Marino provide a juice bankroll to James Basile and Sarno collected the crew's share from Basile each month. DeLaurentis also provided a juice bankroll to Damopoulos.

[10] Independent bookmaking operations are those not affiliated with any street crew.

used by crew members to maintain control over the independent operators.[11]

The Ferriola Street Crew also made great efforts to conceal their illegal activity. For example, the crew provided monetary payments to imprisoned members who refused to testify against the crew. During the grand jury investigation of this case, crew members Garrison, Nicholas, John Caulderullo, and Anthony Petronella, and street tax victim Chuck Cesario were subpoenaed to testify, asserted their Fifth Amendment privilege, were immunized, and still refused to testify before the grand jury. All five were ultimately incarcerated for civil contempt. While incarcerated, they received cash payments which were deducted from the crew's profits.[12] Crew members Jahoda, Harry Aleman, and Jerry Scalise also received cash payments from the crew during or after their imprisonment for various offenses.[13]

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[11] Victims of these extortionate activities included: Vince Rizza, Tony Reitinger, Steve Hospodar, Sam Sammarco, Pat Gervais, Phil Caliendo, Kenton Pielet, Jack O'Brien, Joe Ken Eto, Sam Malatia, Chuck Cesario, George Miller, Chuck Romano, Michael Adams, Greg DiPiero, Ed Cauley, Joseph Pascucci, Gerry Kurth, John Larsen, Dave Puhl, Robbie Hildebrandt, Hal Smith, Phil Janis, Bill Martino, Gerry Otto, Nick Koritsaris, Peter Aivaliotis, John Katris, Thomas Skryd, James Bollman, Robert Garrison, and Spiros Tzivas.

[12] Nicholas, Caulderullo, and Petronella each receive $1,000 per month, Covone received between $1,500 and $2,000 per month, and Cesario receive $500 per month. Nicholas also receive a $75,000 cash payment from DeLaurentis representing his share of the gambling profits earned by the crew during his imprisonment.

[13] Jahoda's wife and girlfriend received monthly payments from Infelise, Marino, and DeLaurentis while he was impris-

(continued...)

Crew members also instructed potential grand jury witnesses to lie. For example, DeLaurentis told street tax victim Gerry Otto to lie to the grand jury. Infelise and R.J. McDonnell joked about the "story" agent Navorat Boonpituk told to the grand jury. And, DeLaurentis and DiDomenico created a story for undercover agent Larry Weeks[14] to tell authorities if he was contacted regarding their Lake Geneva bribery scheme.

In addition, crew members attempted to and bribed police officers, judges, and other political officials to assure the acquittal of crew members indicted on criminal charges and for police protection for the crew's gambling operation.[15] For example, in 1977, Robert Cooley fixed a murder trial for Aleman. On Pat Marcy's instructions, Cooley paid $10,000 to presiding Judge Frank Wilson to fix the case.[16] Aleman was subsequently acquitted in a bench trial.

In 1981, Ken Eto made a series of monthly $1,000 payments to John Monteleone through Infelise and Marino. These payments were to buy police protection from the

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[13] (...continued)
oned for federal income tax violations in 1980-1081. Aleman received a lump sum cash payment of $100,000 from Infelise after serving nearly 12 years in prison. Scalise received monthly payments from Infelise after his imprisonment in England for participating in a major jewel theft.

[14] Larry Weeks was the street name used by undercover agent Larry Kaiser.

[15] Police protection consisted of advance notice of police raids and arrests.

[16] Marcy's role in the crew was to attempt to fix criminal cases against crew members and associates by arranging the reassignment of their cases to a corrupt Judge.

Vice Control Division of the Chicago Police Department for Eto's monte game.

In 1982, Pat Gervais paid a total of $12,000 to the crew for permission to operation his house of prostitution in Lake County, Illinois. DeLaurentis and Marino told Gervais that his $3,000 per month payment would take care of the crew and the Lake County Sheriffs Department, and that the sheriffs department would give him advance warning of any raids or investigations. Gervais received such a warning about a raid in March 1982.

Also in 1982, Infelise instructed Jahoda to give him $1,500 per month out of the Rouse House casino profits so that he could bribe the Lake County Sheriff to get advance notice of raids. Infelise told Jahoda that Ferriola had a contact in the sheriffs department and Infelise had a "hot phone" installed in the casino where the advance raid warnings would be received.

From 1982 through the fall of 1986, the Outfit and the Ferriola Street Crew also controlled the issuance of liquor licenses by Steve Bayovich, the Liquor Control Commissioner in Cicero, Illinois. This was originally accomplished through Bucky Ortenzi, but after Ortenzi's death in 1986, Infelise took over for him. In 1986, Infelise agreed to obtain a Cicero liquor license for a client of Robert J. McDonnell. During this period, monthly bribe payments were made to Bayovich.

In 1986, Infelise, through Pat Marcy and others, bribed his federal probation officer by finding the probation officer's son a job. The probation officer's son interviewed with Frank Maltese and Dino Marino, Louis Marino's son and a high ranking employee at the Town of Cicero

Department of Public Works. The probation officer's son subsequently obtained a job in this department.

In 1987, DeLaurentis informed Jahoda that he paid $1,000 per month to the Forest Park Police Chief to protect the crew's floating craps game. Shortly thereafter, Infelise told Jahoda that the game had been moved to the Argo/Willow Springs area and that protection money was being paid there.

In 1988, Infelise told Jahoda that he had been giving $5,000 per month to Undersheriff of Cook County lames Dvorak to be forwarded to the Cook County Sheriff for protection. In the fall of 1988, Infelise told Jahoda that this payoff had been increased to $10,000 per month. In September 1989, Infelise again confirmed to Jahoda that the crew was paying Dvorak monthly payoffs and that $35,000 in crew funds were being paid each month to incarcerated crew members and "the coppers."

In February 1988, Jahoda was arrested by the Illinois State Police for operating a blackjack game at the Arlington Hilton Hotel in Arlington, Illinois. From the time of his arrest through the fall of 1989, Jahoda had a series of conversations with Infelise, DeLaurentis, and Maltese regarding payoffs they were offering to three Cook County judges to fix Jahoda's case. Infelise told Jahoda that he believed something could be done to have the first judge on the case, Judge Christy Berkos, take care of Jahoda's case.

In the summer of 1988, Maltese told Infelise and Jahoda that he had met with Berkos and that Berkos was holding out for a trip for two to Hawaii. In early 1989, Berkos recused himself from the case. The second judge on the case, Judge Thomas Herr, recused himself

during the summer of 1989. After Hett's recusal, Infelise told Jahoda that Maltese had met with Hett and that Hett would have been given $7,500 to take care of the case. Later, Infelise and DeLaurentis told Jahoda that the third judge assigned to his case, Judge Richard Neville, would be paid $10,000 to fix the case. According to Infelise, Pat Marcy was to handle it. The State eventually dismissed the case on its own motion.

In September 1989, Garrison wanted to run a regular high stakes poker game in Lake County, Illinois. DeLaurentis gave him permission to operate this game on the condition that Garrison pay the crew half of his profits and $250 per month for police protection.

Also in 1989, at DeLaurentis' request, Rocco Pellettiere attempted to make a payoff to DeLaurentis' former brother-in-law, Lake County Deputy Sheriff Willie Smith. Pellettiere offered Smith $500 per month for his approval to place DeLaurentis' joker poker machines in certain Lake County bars and early warning of any police raids on those bars. DeLaurentis later confirmed to Jahoda his belief that Smith had been bribed to permit them to operate illegal gambling activities in Lake County, Illinois.

Every Christmas, Infelise also instructed Jahoda to give him or DeLaurentis money from the bookmaking business to payoff various individuals in the Cook County Sheriffs Department. Upon DeLaurentis' demand, Lake County bookmaker Gerry Otto also paid $1,000 per year into this "Christmas fund." These payoffs ranged from $1,500-$5,000 per year.

Infelise, DeLaurentis, and Jahoda also engaged in a scheme with undercover agent Larry Weeks to bribe a

local Wisconsin zoning official to gain favorable treatment in their efforts to get commercial/industrial property near Lake Geneva, Illinois zoned as residential property. This bribe was to be financed by a $50,000 juice loan to Weeks from funds provided by Infelise, DeLaurentis, and Jahoda. At Infelise's direction, Jahoda obtained the $50,000 to give Weeks from money Spano kept for the crew at Flash Trucking. Jahoda then repaid Infelise for his and DeLaurentis' share of the juice loan. DiDomenico subsequently delivered DeLaurentis' share of the loan to reimburse Jahoda.

The Crew was also responsible for conspiring to murder independent bookmaker Hal Smith.[17] Since at least 1981, Smith was aware of the efforts of the Ferriola Street Crew, particularly Marino and DeLaurentis, to impose a street tax on independent bookmakers in Lake County or force them to become partners with the crew. Smith resisted these efforts. In March 1983, the IRS

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[17] At trial, Infelise and Bellavia were found guilty of conspiring to murder Hal Smith under Racketeering Act 17(a). DeLaurentis was found not guilty on this count,-and the jury could not reach a verdict on this count with respect to Marino and a mistrial was declared. Infelise, Bellavia, Marino, and DeLaurentis were also charged with murdering Hal Smith under Racketeering Act 17(b). The jury could not reach a verdict on this racketeering act for any of these defendants and a mistrial was declared.

Infelise, Bellavia, Marino, and DeLaurentis were also charged with conspiring to murder and murdering Hal Smith in Counts 8 and 9. The jury found DeLaurentis guilty on Count 8, but this conviction was vacated by this court and a mistrial declared on December 30, 1992. The jury could not reach a verdict on Count 8 with respect to Infelise, Bellavia, and Marino. The jury also could not reach a verdict on Count 9 with respect to Infelise, Bellavia, Marino, and DeLaurentis.

seized $600,000 in cash from Smith's home during a highly publicized raid. After this raid, the crew stepped up its efforts to gain control over Smith's bookmaking operation. For six months in 1983, Smith and his partners, Dave Puhl and Phil Janis, paid DeLaurentis $3,000 per month in street tax.

In the fall of 1983, DeLaurentis arranged a meeting with Janis and Robbie Hildebrandt, one of Smith and Janis' phone clerks. At this meeting, DeLaurentis told Janis and Hildebrandt that they and Smith would have to pay street tax. When Hildebrandt told Smith about the meeting, Smith said "fuck that little guinea" and told Hildebrandt that he would take care of it. Janis retired to Florida shortly thereafter.

In late February or early March 1984, DeLaurentis again contacted Hildebrandt about paying street tax. At a subsequent meeting, DeLaurentis told Hildebrandt and Smith that Smith had to pay $6,000 per month in street tax. Smith offered $3,000 and then $3,500, but DeLaurentis refused these offers. Smith then said, "Now you get nothing." A very loud and public argument ensued in which Smith made numerous ethnic slurs about DeLaurentis. DeLaurentis told Hildebrandt that he was going to get a "slap" and told Smith that he was going to be "trunk music." According to the government, it was Smith's refusal to pay street tax which motivated members of the crew to conspire to kill him. The crew could not let the largest bookmaker in the area get away with not paying street tax and flaunting this fact publicly.

In the spring of 1984, Infelise asked Jahoda to show him where Smith lived. Thereafter, Infelise, Marino, and Bellavia went looking for Smith. Infelise asked Jahoda to set up meetings with Smith so that they could observe

him. In the fall of 1984, Infelise instructed Jahoda to keep in contact with Smith.

On or about February 5, 1985, Infelise ordered Jahoda to bring Smith to Jahoda's house in Long Grove, Illinois. Jahoda arranged for Smith to meet him at a bar on February 7, 1985. Jahoda reported this arrangement to Infelise and told Infelise that he would try to get Smith to come back to his house with him.

On February 7, 1985, Infelise, Marino, and Bellavia came to Jahoda's house. Infelise told Jahoda that only he and Smith should come to his house, preferably in Smith's car, Smith should enter the house alone through the kitchen, and Jahoda should try not to go in the house. Later that day, Jahoda met Smith at the bar and brought him back to his house as instructed. Jahoda told Smith to go in through the kitchen while he pretended to go over to his mailbox. Jahoda saw Infelise, Marino, and Bellavia in the house after he arrived with Smith. The last time Jahoda saw Smith, he was dazed and slumped on the floor with Infelise, Marino, and Bellavia surrounding him.

Later that evening, Jahoda returned home and found his house empty. Jahoda noticed that part of the kitchen floor had been mopped. Infelise then called Jahoda and told him to look for a cigar and glasses which Marino thought had been left behind. Jahoda looked for these items but could not find them. Both items were later recovered from Smith's car by the Arlington Heights Police. Jahoda left for Mexico the next day.

Smith's body was found in the trunk of his car on February 10, 1985. The coroner who examined Smith's body concluded that Smith died of strangulation. The

coroner also found that Smith had been tortured because Smith had been severely beaten about the head and face, he had numerous superficial incisions and cuts in his neck and chest, and his throat was slit. None of these cuts were fatal.

While in Mexico, Jahoda received a phone call from Infelise who told him that Smith's body had been found. After Jahoda returned from Mexico, he met with Infelise. Infelise told him that they were all "hot" because of "that thing," and Jahoda was particularly hot. Infelise commented that the murder of Chuckie English was a good distraction and would take the heat off the Smith murder. In subsequent conversations, Infelise told Jahoda that Smith was a snitch and Ferriola wanted to thank him for "that Smith thing."

While working as a government informant, Jahoda obtained consensually recorded conversations with Infelise and Bellavia regarding Smith's murder. Jahoda told them that "Officer Friendly," an alleged corrupt police officer, had passed on bits of information about the Smith murder investigation to him. On October 25, 1989, Jahoda showed Infelise a list of clues supposedly gathered by the police regarding the murder, including cigarette evidence left at the crime scene and a reference to the route the police believed Smith's car took the night he was murdered.

After reading the list, Infelise stated: "when you tell me something like this, you think I could go home and sleep, without having this information? It might not be important to you, but maybe I know more than you do. Do you understand, you know?" Infelise also questioned the accuracy of the police notes on Smith's car. He stated: "The car, right? It come from there to your house.

It went all the way to mother fuckin' Arlington Heights. That's where they found the car. So how could the speedometer only have three miles on it." Government Exhibit 453.

In an October 30, 1989 consensually recorded conversation, Bellavia and Jahoda also discussed the Smith murder. Jahoda discussed his concern that little clues might have been inadvertently left which would trace the murder to them:

> Jahoda: Here's a fucking success. I just want to point out an error or two. He should never have picked up that phone. The biggest break we got is the next day. I don't know if he told you this. Cook County's all over my house. I'm already turned in as, as a missing person.
>
> Bellavia: Yeah.
>
> Jahoda: I got a guy in the house that won't let them in.
>
> Bellavia: Yeah.
>
> Jahoda: And who knows what the hell was in there?
>
> Bellavia: Yeah.
>
> Jahoda: Whoever brought the, the, the rope. I mean, I know everybody's got gloves. What the fuck? But when that rope was bought, it wasn't bought with gloves on. The fucking bag was there. The wrapper was there. The receipt was there. True Value Hardware or whatever. I mean, I, you know, it's just the little things. (Inaudible).
>
> Bellavia: Yeah, right. Them are the little things that, ah
>
> . . .
>
> Jahoda: You know, who, whoever, did the floor leaves the fucking mop. You got to make sure that you use

gloves, if, if I don't come home that night. If I catch that plane in the morning, which I almost did. I almost stayed at a broad's house.

Bellavia: Yeah.

Jahoda: Cuz I had my luggage. I almost never went home. So fortunately I was there to tidy up.

Bellavia: There's things that you can be, there's things you can be so careful about, and yet there's little, little things.

Jahoda: Cuz I know that, that there was either, you know, I don't wanna know where it came from, you know, Bobby Salerno or yourself. Just, just learn from our successes.

Bellavia: That's right. That's right.

Government Exhibit 457 at 16-17. Jahoda and Bellavia also discussed Smith's murder on another occasion:

Jahoda: I mean I'm talking about the period. He just never told me a God damn thing.

Bellavia: Well, as a rule they should, but they don't, you know. When a guy's got bones.

Jahoda: He drove me back to the tavern and said, "Burn your clothes and leave. He doesn't say how long you guys are going to be [at Jahoda's house with Smith] or where's he's going.

Bellavia: Yeah.

Jahoda: You know what I mean? Like, I know, that, that guy [Smith] ain't there to buy tickets to the, to the Knights of Columbus Smoker.

Bellavia: (Laughs).

Jahoda: But in my wildest dreams, I don't picture him getting fucking sliced and diced in the kitchen, either.

Government Exhibit 457 at 20-21. In a subsequent discussion, Bellavia further assured Jahoda that Smith was only in the kitchen so he did not have to worry about evidence turning up in another room of Jahoda's house. Jahoda asked: "Except I just want to know one thing. Was that, that guy any place but that kitchen? He never left the kitchen." Bellavia told him "No." When Jahoda stated: "So, all I know is I sterilized that kitchen, but I never went past that kitchen. Kitchen and that side bathroom," Bellavia again responded: "No, that's all. That was it." Government Exhibit 457 at 32-34.

B. *Defendant Marino's Role in the Ferriola Street Crew*

Marino began his involvement with the Ferriola Street Crew as a bookmaker and a strong-arm collector. During the time the crew was managed by Infelise, Marino's responsibilities increased until he became a crew supervisor, serving directly under Infelise before and after Infelise became the crew boss. In addition to his collections responsibilities, Marino supervised other bookmakers, including Homer Gonzalez, and, at times, handled the bankroll for the bookmaking and juice loan operations. Marino provided juice loan bankrolls to Nicholas, Michael Pascucci, and James "Duke" Basile, and extended juice loans, most notably to bookmaker Dominic Basso.

Marino also supervised various aspects of the crew's gambling operation. For example, Marino supervised-the distribution of parlay cards. Sam Malatia testified that in 1980, DeLaurentis hired him to distribute parlay cards. He occasionally received the cards from Marino at Marino's home. After the games were completed, Malatia would report the winners and losers on the cards to

Marino or DeLaurentis. While he generally received the money to pay off winning players from DeLaurentis, Malatia testified that on one occasion he received the money from Marino.

On November 13, 1983, federal agents searched Marino's home and found voluminous parlay card stubs with parlay car agents' notations on them. According to the government, this discovery demonstrates that Marino's home was used as a clearing house for the crew's parlay card operation. Federal agents also found "master" parlay card stubs at Marino's house, with the winning and losing teams for each game indicated by being circled. According to the government, such master card stubs would only be used by someone figuring out the winning and losing bets for a parlay card wager. The master parlay card stubs found in Marino's home were in sequence with an identical master parlay card stub found on the same date at Infelise's home.

Marino also supervised the crew's casino in Libertyville, Illinois. Jahoda and Charles Burge, a card cheat who worked at the casino, testified at trial that Marino had responsibilities in the casino's cage, where the chips were sold to players. Marino was also in charge of the casino's security and spent time outside the casino watching for law enforcement.

In recorded conversations with Jahoda in 1989, Infelise, DeLaurentis, and Nicholas indicated that as of that year, Marino supervised Nicholas' wagering activities, at least with respect to the floating blackjack games Nicholas was operating in Greek Town. Marino also provided a juice loan bankroll to Nicholas so that Nicholas could make juice loans to his customers.

Because of his supervisory position, Marino was considered by the crew to be one of the persons capable of keeping the crew's illegal businesses going in the event that other crew bosses went to jail. The following consensually recorded conversation between Jahoda and DeLaurentis took place:

> DeLaurentis: Sure. What the fuck? You know, I'm going to try and keep this thing going. Let's say they scoop [arrest] us. I'm putting guys in now to keep this fucking thing going. One thing is going to jail and you still got everything going, and you know that, like you did last time.
>
> Jahoda: Oh yeah.
>
> DeLaurentis: That's another thing to go we're all closed up, you know. So I'll try to get a couple of guys in line nobody's home, B. You know, either me or Rocky [Infelise] or Louie [Marino], one of us, it will be a lot better if one of us is out on the street.
>
> Jahoda: True.
>
> DeLaurentis: If we're all gone, then the guys behind us. We might lose a little money, somebody might steal a little along the way, but we still got it going.

Government Exhibit 447 at 14-15.

In addition, pursuant to Infelise's order, troublesome accounts were given to Marino and DeLaurentis for collection. Marino would often use strongarm tactics in making these collections. In 1981, bookmaker Steve Hospodar lost approximately $12,000 when his bettors refused to pay him. Hospodar was responsible to the crew for the debt, but did not have the money to pay it. Hospodar recorded several conversations he had with Infelise, Marino, and DeLaurentis about the $12,000 debt. On February 6, 1981, Hospodar taped a conversa-

tion he had with Marino and DeLaurentis at a restaurant about the money he owed. In part, the following discussion took place:

Marino: (Inaudible) . . . He got any money today?

DeLaurentis: He ain't got nothin', nothin'.

Marino: Nothin' . . . You motherfucker, I wish this was real, you motherfucker, I'll give ya' it right here ya' dirty mother, come on [at this point in the conversation, Marino picked a knife up off the table and stuck it in Hospodar's ribs].

* * *

Marino: What do you got, motherfucker, jewelry anythin' you got, I want ever mother . . .

Hospodar: Here . . .

Marino: . . . fucker thing you got (Inaudible) . . .

Hospodar: This is all I got with me now. Here's a bond that I'm pinched. It's a hundred dollar bond.

DeLaurentis: what's this?

Hospodar: That's ah, a guy made a payment.

Marino: Hold this.

Hospodar: That's all, what the hell, I don't . . .

Marino: where the fuck is this money comin' from?

Hospodar: Lou, I ain't got nothin'. I got nothin' at all.

Marino: Hey, you took a shot at me, you motherfucker.

Hospodar: Well here.

Marino: What do I look like, a fuckin' nitwit!

Hospodar: No, no, no, no, I told him I got a buyer for the lot. Let me try and sell the goddamn lot!

Marino: Wait, wait, tell me I'm gonna wait until you sell the fuckin' lot?

Hospodar: Well . . .

Marino: Who the hell, what do I look like?

Hospodar: Believe me.

Marino: I want this motherfuck, I don't give a fuck where you find it, I want this motherfuckin' money. I want money tonight! You hear what I'm tellin' you. I want money tonight, you motherfucker!

* * *

Marino: . . . And I mean what I'm tellin' ya'. And don't go hide you motherfucker, you can't hide . . .

Hospodar: I won't hide.

Marino: You can't fuckin' hide nowhere.

* * *

Hospodar: I never hide from anybody Lou.

Marino: I'll put it, I'll be goin' to sleep with you at night, and you will bring fuckin' money tonight! You hear what the fuck I'm telling you?

* * *

Marino: Now I don't have to tell ya' what the fuck is this, how serious this is. Now you hear what I'm tellin' ya'? Ya' hear what I'm tellin' ya?

Hospodar: I hear ya'.

Marino: 'Cause I'm gonna be in your house, on your doorstep, I'll shake every motherfuckin' thing down in there.

Hospodar: All right.

Marino: And don't think that I ain't fuckin' capable. And don't call nobody . . .

Government Exhibit 304.[18]

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[18] In 1984, Infelise, Marino, and DeLaurentis were tried and acquitted for Hospodar's extortion.

Zitello and Marino confronted another bettor, Ray Cavanaugh, at the Board of Trade where Cavanaugh worked regarding Cavanaugh's betting account. Bettor Burt Goldstein, who saw the confrontation, told Jahoda that he thought Marino was going to throw Cavanaugh over a balcony. Cavanaugh paid off his debt after Zitello's and Marino's physical confrontation with Cavanaugh.

In 1982, a delinquent bettor who owned a race horse named "Corleone," owed Miller approximately $9,000 in gambling debts. Miller turned the collection over to Jahoda who turned it over to Infelise and Marino. Infelise, Marino, and Jahoda had a meeting with the bettor during which Marino physically braced the bettor against a wall. On the night of the confrontation he was to point out the bettor and walk away. After he pointed out the bettor, Miller heard screams coming from the bettor's direction as he walked into the hotel bar. Jahoda later told Miller that they had turned the bettor upside down and Marino took money from the bettor's wallet.

Marino was involved in the intimidation of Kenton Pielet. Pielet acted as a 50/50 bookmaker for the crew starting in the summer of 1979 and as a 25% agent during the basketball season of 1980. During the football season of 1979, Pielet had approximately 50 betting football customers who lost approximately $102,000. One of Pielet's bettors, Larry Holler, lost $26,000 in one week. After there were difficulties in collecting Holler's debt and Holler indicated that he was going to refuse to pay, a meeting was set up between Holler, Pielet, Marino, and Zitello. Holler paid off the $26,000 at this meeting.

Holler was permitted to continue betting during the basketball season of 1980 and ultimately lost over $13,000. After Holler did not pay off his debt, a meeting

was set up between Pielet, Infelise, and Marino. At this meeting, Pielet told Infelise and Marino that he tried to collect Holler's debt, but that Holler did not have the money. Infelise told Pielet that he was responsible for Holler's debt. When Pielet laughed at this suggestion, Marino slapped him across the face. Infelise then told Pielet that he would have to collect the debt and pay $500 per month in street tax. Pielet then agreed to make the street tax payments because the slap by Marino scared him. Pielet later switched to another street crew run by Sam Carlisi. This change in crew membership only occurred after Pielet obtained permission to switch and Holler's $13,000 debt was resolved.

Marino was also involved in the intimidation and extortion of Patrick Gervais. Before becoming involved with the Ferriola Street Crew, Gervais had a street tax relationship with Victor Spilotro, a boss from another crew. But, within a week of opening a house of prostitution in Lake County, Illinois, Gervais received a phone call from DeLaurentis advising him that he would have to pay a $3,000 per month street tax to the Ferriola Street Crew. When Gervais spoke with Spilotro about the phone call, Spilotro told Gervais not to pay DeLaurentis because "he had the muscle." Marino then set up a meeting with Gervais which Spilotro also attended. When Marino and Infelise showed up for the meeting, Spilotro looked surprised to see Infelise. After Spilotro and Infelise had a brief, private discussion, Spilotro told Gervais that "I am out" and that Gervais' house of prostitution was "in their territory." Spilotro also told Gervais that he would have to deal with Marino and Marino commented, "that's right, that's ours." After Infelise's intercession, Gervais began paying street tax to the Ferriola Street Crew. Ger-

vais paid a total of $12,000 to the crew to protect his Lake County house of prostitution.

Marino was also involved in the intimidation and extortion of George Miller, Jr. Miller was an independent bookmaker who worked with bookmaker Hal Smith during the late 1970's. In 1980 or 1981, Miller broke away from Smith and began working as an independent bookmaker in Lake County with his father George Miller, Sr. The Millers also ran a lucrative parlay card business during this time. In 1982, Infelise, Marino, and DeLaurentis decided to take over the Millers' operation. A meeting was arranged between the Millers, Infelise, Marino, and DeLaurentis. At the meeting, Marino told the Millers that they had to split their business with them. If they did not join the crew, Infelise told them that they would smash their parlay card printing press. Marino further told them, "We are taking over Lake County. There are only two crews in Lake County, Posner and us."

After this meeting, the Millers discussed their situation with other bookmakers and learned about DeLaurentis' reputation as a mob enforcer. At a second meeting with Infelise, Marino, and DeLaurentis, George Miller Jr. told them that he would join the crew's business. Infelise, Marino, and DeLaurentis subsequently took over the Millers' business on a 50/50 basis and employed Miller in one of their wire rooms. In 1982, the crew received $75,000 for their 50% interest. After 1982, Miller basically got out of the parlay card business, but DeLaurentis warned him that if he ever got back into parlay cards again, it had "better be with us."

Marino also collected payments from Roy Salerno. In the summer of 1983, Salerno, one of George Miller's bet-

tors, lost $100,000 in baseball wagers to Miller. Miller eventually turned the debt over to Jahoda who in turn advised Infelise about the debt. Infelise told Salerno that he would have to make monthly payments of $1,500 until the debt was paid off. Marino, DeLaurentis, and later, Bellavia collected these payments from Salerno for several years until Infelise "cashed out" the debt for approximately $10,000-$15,000. Miller did not receive any of the money collected by the crew.

Marino was also involved in the intimidation of Ken Eto. Eto had been in the gambling business in one form or another since the late 1950's and had paid street tax to outfit bosses during this time. Eto was introduced to Infelise in the late 1950's or early 1960's by Turk Turello. In 1980, Eto was interested in opening and sought permission from Ferriola to open a Bolita game,[19] but, if he failed to get permission before opening a game, he could very well get hurt. Ferriola consulted with Vince Solano, Eto's boss from the Rush Street Crew, and they decided that Eto would be required to pay $5,000 per month starting in May 1980 to operate the game. Solano told Eto to pay the street tax directly to Infelise. After that meeting, Eto met Infelise and Marino monthly to pay them $5,000 until February 1982. In total, Eto paid Infelise and Marino approximately $100,000 in street tax.

Eto also paid Infelise and Marino protection money, which was to be passed on to John Monteleone, for a Monte game. In the fall of 1981, Infelise gave Eto permission to move the game to Lake County because of the heat it was getting, but Eto declined because Lake Coun-

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[19] Bolita is a Puerto Rican numbers game.

ty was too far. Eto also had a bookmaking partnership with Joe Borsellino. In early 1982, Infelise took Borsellino's business away from him because Borsellino owed him $20,000. Infelise permitted Eto to maintain his interest in the business and gave Eto a betting line. In late 1982, Eto made arrangements for two independent bookmakers to meet Infelise and Marino to receive a betting line and a number to call for their action. And, in late 1981, Eto sought Infelise's permission to open a strip joint. Infelise told Eto that he could not open the strip joint because his intended location was "sacred territory." According to Infelise, the refusal was not coming from him, but straight from the "old man."[20]

Marino was also involved in the intimidation and extortion of Thomas Skryd,[21] an attorney who pleaded guilty to tax violations and agreed, pursuant to his plea agreement to cooperate with the government. In approximately March 1984, Skryd and his wife purchased a tavern called "TJ's Pub" in Lyons, Illinois and managed by Ken Kreble. During the first year of Skryd's ownership, a money stakes poker game was played in the rear of the tavern. After he had owned the bar for some time, he was advised that the Outfit did not like the fact that he had a poker game at his tavern. Skryd was then introduced to Marino who he knew to be a member of the Chicago Outfit associated with Infelise and moving up in the ranks of the Outfit. When they met, Marino told Skryd that he had heard about Skryd's poker game. When Skryd told him it was just a neighborhood game,

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[20] Jahoda testified that the "old man" was Joseph Aiuppa.

[21] Evidence of this charge was not presented at trial and the jury did not consider this charge against Marmo.

Marino replied: "you're in our business." Marino told Skryd that something could be worked out and to go ahead with the game. Marino said he would see Skryd once a month but he did not know what to charge Skryd because he did not know how much the poker game was worth. Skryd was to tell Marino what he thought it was worth and what payoff seemed fair, and Marino would see how well the game did and adjust the payments accordingly.

Marino also told Skryd not to worry about the card game because "we" have inside information and could warn him about police raids before they occurred. Marino said that there were other games in the same area as Skryd's bar and that he could not let Skryd get away without paying because then the other card game operators would complain. Marino further told Skryd that while attorney Bob Stevenson did some of "their" legal work, he could throw some syndicated gambling cases to Skryd.

After meeting with Marino, Skryd told his manager to stop the game. Skryd stopped the card game because he was not charging for it and therefore did not make money which warranted making monthly payments to Marino. Skryd did not want to have any dealings with Marino since he knew Marino was associated with the Outfit and Skryd was afraid of having any dealing or trouble with it. Skryd never considered continuing the card game without paying Marino. After shutting down the game, Skryd had not further contact with Marino.

Finally, as described in detail above, Infelise, Bellavia, and Marino were involved in the conspiracy to murder Hal Smith.

The Objections To The PSI And
The Government's Motion For Upward Departure

A. *Section 3C1.1: Obstruction of Justice*

1. Hal Smith's Murder

The probation officer assigned Marino a total adjusted offense level of 28. The government objects to this determination, claiming that Marino's total adjusted offense level should be 29 because Marino should receive an enhancement pursuant to Section 3C1.1 for obstruction of justice.[22] The government contends that a Section 3C1.1 enhancement is warranted because Hal Smith's murder was motivated, in part, by the belief that Smith was a snitch. Since the government claims that sufficient evidence has been presented to warrant considering Smith's murder at sentencing and the murder of an informant constitutes obstruction of justice, the government argues that Marino should receive a Section 3C1.1 enhancement.

The determination of whether Marino should receive a Section 3C1.1 enhancement depends upon a finding that Marino should be held accountable for Hal Smith's death.

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[22] Section 3C1.1 provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

The addition of this enhancement would bring Marino's highest offense level, the offense level for the intimidation and attempted extortion or extortion of Patrick Gervais as charged in Racketeering Acts 10(a)-(b), up to 24. With the addition of 5 unitizing points pursuant to Section 3D1.4, Marino's total adjusted offense level would be 29.

When reviewing evidence at sentencing, the Seventh Circuit has clearly established that it is appropriate to apply the preponderance of the evidence standard. *See United States v. Masters*, 978 F.2d 281, 286-87 (7th Cir. 1992); *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991). Based upon this court's careful review of the evidence presented regarding Hal Smith's murder, this court is persuaded that the government has shown by a preponderance of the evidence that Marino should be held accountable for Hal Smith's death.

As thoroughly explained in the background section of this opinion, Jahoda testified extensively about the stalking and murder of Hal Smith. Jahoda testified that Smith refused to pay the street tax the crew demanded and this refusal motivated crew members to conspire to murder Smith.

Jahoda also testified that, as arranged during a prior meeting between Jahoda, Marino, Infelise and Bellavia, Jahoda brought Smith to his house on February 7, 1985 and left him there with Infelise, Bellavia, and Marino. Jahoda last saw Smith dazed and slumped on the kitchen floor with Infelise, Bellavia, and Marino standing over him. When Jahoda returned home later that evening, he noticed that part of the kitchen floor had been mopped. Smith's body was found in the trunk of his car three days later, on February 10, 1985.

This court has already determined that sufficient evidence has been presented to prove by a preponderance of the evidence that Infelise and Bellavia participated in

Smith's murder.[23] Jahoda clearly identified Infelise and Bellavia as participating in the stalk and murder of Hal Smith and this court finds Jahoda to be credible. During the trial, Jahoda was on the witness stand for approximately 4-5 weeks, testifying regarding illegal acts committed by Ferriola Street Crew members. On many occasions, Jahoda's testimony was corroborated by other witnesses and tape recorded conversations. *See. e.g., United States v. Infelise*, 90 CR 87 (N.D. Ill. July 14, 1993); *United States v. Maltese*, 90 CR 8719 (N.D. Ill. June 18, 1993); *United States v. Zitello*, 90 CR 87-11 (N.D. Ill. Feb. 17, 1993); *United States v. Aleman*, 9 CR 87-12 (N.D. Ill. Dec. 16, 1992). This court had the opportunity to view this witness and his cross-examination, and finds his testimony to be credible.

It is clear that this court can rely on Jahoda's testimony alone in meeting the preponderance standard that is applicable here. Indeed, the uncorroborated testimony of a co-conspirator can be relied upon when finding beyond a reasonable doubt that a defendant is guilty of a crime. *See United States v. Byerley*, 91-3625 (7th Cir. July 13, 1993); *United States v. Trujillo*, 959 F.2d 1377 (7th Cir.), *cert. denied*, 113 S.Ct. 277 (1992). In the instant case the court has relied not only on Jahoda's testimony but corroboration by tape-recorded conversations or other evidence regarding details of the murder.

For example, in an October 25, 1989 conversation, after showing Infelise a list of clues allegedly gathered by the police, Infelise questioned the accuracy of the police's information about Smith's car. Infelise said: "The car,

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[23] *See United States v. Infelise*, 9 CR 87 (N.D. Ill. July 14, 1993).

right? It comes from there to your house. It went all the way to mother fuckin' Arlington Heights. That's where they found the car. So how could the speedometer only have three miles on it." Government Exhibit 453.

Bellavia also discussed details of the murder with Jahoda in an October 30, 1989 conversation:

> Jahoda: Whoever brought the, the, the rope. I mean, I know everybody's got gloves. What the fuck? But when that rope was bought, it wasn't bought with gloves on. The fucking bag was there. The wrapper was there. The receipt was there. True Value Hardware or whatever. I mean, I, you know, it's just the little things.
>
> Bellavia: Yeah, right. Them are the little things that, ah . . .
>
> Jahoda: You know, who, whoever did the floor leaves the fucking mop. You got to make sure that you use gloves, if, if I don't come home that night. If I catch that plane in the morning, which I almost did. I almost stayed at a broad's house.
>
> Bellavia: Yeah.
>
> Jahoda: Cuz I had my luggage. I almost never went home. So fortunately I was there to tidy up.
>
> Bellavia: There's things that you can be, there's things you can be so careful about, and yet there's little, little things.

Government Exhibit 457 at 16-17. In a subsequent conversation, Bellavia also assured Jahoda that Smith was only in the kitchen on the night of his murder. Jahoda asked: "Except I just want to know one thing. Was that, that guy any place but that kitchen? He never left the kitchen?" Bellavia told him "No." When Jahoda stated: "So, all I know is I sterilized that kitchen, but I never

went past that kitchen. Kitchen and that side bathroom," Bellavia again responded: "No, that's all. That was it." Government Exhibit 457 at 32-34. This evidence clearly places Infelise and Bellavia as participants in Smith's murder because only individuals with intimate knowledge of the crime would be able to discuss the murder in such detail.

Jahoda also identified Marino as participating in the stalking and murder of Hal Smith. Indeed, Jahoda testified that he last saw Smith slumped on the kitchen floor, with Infelise, Bellavia, and Marino standing over him. Jahoda further testified that he received a phone call from Infelise on the night of the murder because Marino thought evidence, either substantiated Smith's glasses or a cigar, had been left behind at Jahoda's house. Significantly, cigars and Smith's glasses were recovered from Smith's car when his body was discovered in the trunk of the vehicle. Jahoda's testimony is further substantiated by this October 30, 1989 taped conversation between Bellavia and Jahoda:

> Jahoda: . . . Rocky called me that fucking night. Bellavia: Mmm hmm.
>
> Jahoda: That phone should have been bad. He called my house, I'm telling you, after I got home. Now this is six months after the G raids my house. This is six months before all them fucking phones out there are tapped.
>
> Bellavia: Ah huh.
>
> Jahoda: He calls me that night. And, and says, Louie thinks the guy lost either glasses or a cigar. I forget which, do you remember? Did he say?
>
> Bellavia: Yeah, it was, it was important enough to make a phone call.

Jahoda: He should have sent somebody.

Bellavia: I would have drove, if he'd a told me, I would of went out there.

Jahoda: He should have sent somebody.

Bellavia: Yeah, I agree.

Jahoda: I mean, I know Louie's clean because there's a million Louie's, he didn't say, Louie you know, Marino.

Bellavia: Yeah.

Jahoda: But, he says Louie even on tape. My voice is on tape. And I'm in this fucking house. And I'm cleaning this fucking house when he calls. I mean, not that it was a slaughterhouse, it wasn't. Don't misunderstand me.

Bellavia: Yeah. No, no, I know.

Jahoda: I knew that nobody was (Inaudible).

Bellavia: But nothing ever come from it.

Jahoda: No, well, that was one more thing . . . that was close . . .

Government Exhibit 457 at 15-16.

This recorded conversation clearly implicates Marino in Smith's murder. In the conversation, Bellavia obviously understands what Jahoda is talking about when Jahoda says that Marino thought incriminating evidence was left at the scene of the crime. And Bellavia, an individual who has demonstrated intimate knowledge about Smith's murder, does not question Jahoda or protest in any way when Jahoda indicates that Marino was present at the scene of the crime.

Additional support for this court's determination that Marino participated in Smith's murder is provided by the following November 2, 1989 conversation in which

Jahoda and Salerno refer to Marino's concern that evidence had been left behind at the crime scene:

> Jahoda: I don't know if you're aware of this, Louie and Rocky and myself got subpoenas.
>
> Salerno: Subpoenas?
>
> Jahoda: To go a week from today . . .
>
> Salerno: Let me see this, wait . . .
>
> * * *
>
> Jahoda: And we know what this is.
>
> Salerno: Yeah.
>
> Jahoda: And we're not worried about it. But I don't think you know this, so I want you to, I want you to know what it involves. Rocky made a very serious mistake that night. He called me from the outside. He told me that Louie had left something there . . .
>
> Salerno: Yeah, don't even talk about it.
>
> Jahoda: No, I understand that. So, but, but it was picked up on a tape. So that's why the three of us . . .
>
> Salerno: Don't even, don't even, don't even tell me about it. They ain't got shit.
>
> Jahoda: I know that, but he wanted you to know.

Government Exhibit 459 at 3.

In sum, not only did Jahoda testify under oath that he saw Marino stalk and prepare to murder Smith, but Bellavia, Marino's co-conspirator who has demonstrated an intimate knowledge of the murder and whom this court has found responsible for Smith's death, acknowledged that Marino was concerned about leaving incriminating evidence at the scene of the crime. And, the two items Marino was concerned were left at the crime scene were found by the police in Smith's car. Such evidence is sufficient to prove by a preponderance of the evidence that

Marino participated in Hal Smith's murder. Therefore, despite Marino's denials, this court finds that Smith's death can be considered for sentencing purposes.

Having determined that there is sufficient evidence demonstrating that Marino participated in Hal Smith's murder, this court must now determine whether an obstruction of justice enhancement is warranted. As this court explained in its June 25, 1993 opinion regarding Infelise's and Bellavia's objections to their PSI's, this court is not persuaded that Smith was murdered in an effort to obstruct the government's investigation of the Ferriola Street Crew. The only evidence supporting the government's claim is Infelise's statement to Jahoda, after Smith's body was found, that Smith was a 'snitch.' No evidence has been presented which shows that crew members knew Smith was a government informant before Smith's death or that Smith was killed because he was a government informant. Therefore, this court finds that Smith's murder does not provide a proper basis for assessing Marino an enhancement pursuant to Section 3C1.1.

2. Payment of Hush Money to Robert Covone

An obstruction of justice enhancement is warranted, however, based on Marino's involvement in paying hush money to crew member Robert Covone. As this court explained in the background section of this opinion, the crew regularly paid hush money to employees when they refused to testify before the grand jury about crew activities, despite having been granted immunity, and were jailed for contempt. In 1989, Covone was jailed for contempt when he refused to testify about the crew before

the grand jury. Marino directly participated in paying Covone hush money while he was in jail by relaying Covone's request for money to Infelise. In a recorded conversation between Jahoda and crew member Edward Stevenson, Stevenson discussed paying Covone:

> Stevenson: This, his wife got a hold of me, Bobby's wife.
>
> Jahoda: Yeah, Covone.
>
> * * *
>
> Stevenson: Yeah, right, so anyway, she [Covone's wife] told me that he paid a bill and he left her and number one she needs 2,000 a month, ok?
>
> Jahoda: Ok.
>
> Stevenson: So, I talked to our pally [Infelise] last night, that's ok. Here's what happened originally. That's why Solly was going to call you. When I talked to her, last time I talked to Bobby [Covone], he told me, he said he had bills. He showed me the bills. He said they were 1,500 and something. He said that the bills were really 1,700, he says, but I don't want to be a mooch, you know, with B.J. So I happen to say to Louie [Marino], I said, you know, the kid says he don't want to be a mooch. I don't know, the broad got a little baby, this and that. In the meantime, this is prior, so evidently he must have told Rocky Friday night at Gabeet's wedding, right? Did you go to the wedding?
>
> * * *
>
> Stevenson: . . . Alright. So evidently he must have told Solly to get a hold of you and tell you about this 1,700, so when I went to his house last night . . .
>
> Jahoda: I'm missing the link though.
>
> Stevenson: Yeah.

> Jahoda: Oh, you told, you told Rocky.
>
> Stevenson: I told Louie.
>
> Jahoda: You told Louie.
>
> Stevenson: Who in turn told Rocky. Alright?
>
> Jahoda: Ok.
>
> Stevenson: So I went last night. He said, what the fuck, it's 17, now it's 2, she can't be coming and doing, I said listen, that 17 was just a conjecture on my part. I said, he just happened to say. I said, she didn't ask me. When I met her she told me that she needs $2,000 a month the 15th of the month. . . .

Government Exhibit 401 at 2-5. Such knowing participation in the payment of hush money to Covone demonstrates Marino's willingness and desire to obstruct the grand jury's investigation of the crew's activities. While crew employees may have also had other reasons for refusing to testify before the grand jury, the payment of hush money to those who would not testify took away some of the coercive effect of being jailed for contempt. Such intentional obstruction of the grand jury's investigation clearly warrants the obstruction of justice enhancement that the government recommends.

3. Police Protection for Patrick Gervais

The government also contends that an obstruction of justice enhancement is also warranted because Marino participated in a scheme to provide police protection to Patrick Gervais' prostitution business. This court agrees. As explained in the background section of this opinion, Gervais paid $3,000 per month in street tax to cover the crew's interest and payoffs to individuals at the Lake

County Sheriffs Department. Gervais testified at trial about the following conversation with DeLaurentis:

Q. In this conversation what was said?

A. Solly D said he heard that I was a good guy, that I understood things and the way they were and that it would cost me $3,000 a month to operate Cheri's Studios because that place was theirs.

Q. Did he say what the $3,000 a month would be for?

A. I did ask him that. He said it would take care of all my problems. It would take care of the heat and it would take care of us, him and the arm.

Q. What did you understand "the heat" to mean?

A. The Lake County Sheriffs Department.

Q. And "the arm," who's that?

A. The organized crime.

Q. What did you say in response to this?

A. I told him that I had a partner who was supposed to take care of those things for me and I would have to get together with him before I pay anybody anything.

Q. Did you describe in any way your partner to Mr. DeLaurentis?

A. Yes, I did. I said his name was Vie. He had a brother Tony that lived out in Vegas and a brother Mike that owned a restaurant on North and Harlem Avenue.

Q. When you described your partner to Mr. DeLaurentis what, if anything, did he say in response?

A. He said, "Yes, Vie and I know each other. Vie understands things. There won't be any problem."

Q. Did Mr. DeLaurentis bring up anybody else's name during this conversation?

A. Yes, he did. He said he would get his partner Louie who was out of town to meet with Vie and discuss things with him.

Q. Was there any discussion of when the first $3,000 payment would be made?

A. Yes, he told me I would have to pay it by Friday night at 9:00 o'clock at the Journey's End to Louie, Louie Marino.

(Tr. at 8291-92, January 29, 1991). Gervais also testified about a conversation he had with Marino:

Q. When Mr. Spilotro waved you over to the table that had yourself and Mr. Marino, what did you do?

A. I went and sat at the table.

Q. Was there a conversation amongst the three of you?

A. Yes.

Q. What was said in that conversation?

A. Victor started the conversation. He said, "Pat," he says, "that joint up there is theirs. It's their territory. If you want to open up up there, you will have to deal with their man." He says, "Actually—" he told me, "Frankly, there is just not enough business in the place to consider it worth its while," and that he was going to back out of the business and allow me to operate it and would have to deal with Louie to do that.

Q. When Mr. Spilotro said that's their territory up there, what, if anything, did Mr. Marino say?

A. He said, "Yes, that's right. That's ours."

Q. Did you have a discussion then with Mr. Marino?

A. Yes, I did. I asked him if he took care of the heat and took care of all my other problems that would exist up there. He said $3,000 would do that.

(Tr. 8307-08, January 29, 1991). Gervais also testified that Marino and DeLaurentis told him that he would receive advance warning of any raids or investigations of his house of prostitution:

Q. Was there any discussion about police in this conversation?

A. Yes, there was.

Q. What was said in that regard?

A. I asked how they will handle the arrest if the place was ever—what do you call it?

Q. Raided?

A. Raided, yes. And he said—

Q. Who said?

A. Louie. I am sorry. And Louie said, "We have a way of handling that. There will be a phone call on that day from the heat, and they will tell you that, 'My uncle is coming in tonight,' and from that point on you do everything legit. You don't do any blow jobs or anything else in the back room that was illegal."

(Tr. at 8309-10, January 29, 1991). Gervais further testified that he received such a warning on one occasion under the code previously given to him by Marino. This testimony is corroborated by the following March 9, 1982 conversation between him and DeLaurentis:

DeLaurentis: They got your phone number now. If anything comes down, (inaudible) calls and say "Your uncle's on the way."

Gervais: Yeah.

DeLaurentis: When they say that, just clean it up a little bit. Like if they see a stranger coming in, don't let them even work on him. Uh, give him a fucking message, no blow jobs or nothing.

Gervais: Alright we'll do photographs.

DeLaurentis: Or whatever it is . . . Gervais: You know.

DeLaurentis: . . . that you do. And, uh, I mean you know your regular customers and you know who's a stranger.

* * *

Gervais: Oh Solly, just out of curiosity, okay, I wanna make sure that this is, ah . . . Okay, a week ago Monday, somebody gave us a call, right . . . Okay, I just wanted to make sure.

DeLaurentis: Oh, no, I don't know . . . you're telling me this (garbled).

Gervais: Okay, because one of my girls, uh, answered the phone, she hung it up, and she told the desk man who was in the bathroom at the time that, ah, a guy just called and says it's you uncle and we'll be comin' in tonight. Now this was, this is Mon. . .

DeLaurentis: See, they don't call me. They call you straight.

Gervais: Right, okay.

Government Exhibit 315 at 9.

Marino's and DeLaurentis' bribery of police officers to protect Gervais' illegal prostitution operation clearly fails within the confines of Section 3C1.1. As the government suggests, "Marino's and DeLaurentis' attempts to give Gervais advance warnings of police raids was obviously to impede and obstruct the administration of justice in connection with the investigation and prosecution of the

illegal activity."[24] Therefore, Marino's participation in obtaining police protection for Gervais provides another basis for the assessment of a Section 3C1.1 enhancement.

B. *Section 3B1.1(b): Crew Supervisor or Manager*

Marino objects to the probation officer's assessment of a 3 point enhancement pursuant to Section 3Bl.l(b) because he claims that there is insufficient evidence to prove that he was a crew manager or supervisor.[25] However, this court is persuaded that Marino was a supervisor or manager and should receive this enhancement. For example, Marino held a supervisory position in the parlay card operation. In 1980, Sam Malatia was hired by DeLaurentis to distribute parlay cards. On occasion, Malatia would pick up his parlay cards from Marino at Marino's home and would receive money from Marino to pay off parlay card winners. In addition, voluminous parlay card stubs with parlay card agents' notations on them were found in Marino's home during a search by federal agents on November 13, 1983. The master parlay card stubs found also had the winners and losers noted on the stubs and were in sequence with the identical

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[24] Government's Submission Concerning the Presentence Investigation Report for Louis Marino at 7.

[25] Section 3B1.1(b) provides:

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

master parlay card stubs found by federal agents on the same date in Infelise's home.

Evidence was also presented which showed that Marino played a supervisory role at the Libertyville Casino. According to Jahoda and Charles Burge, Marino had responsibilities in the casino's cage, where chips were sold to players, and Marino was in charge of the casino's security. Marino supervised other aspects of the crew's gambling operation. For example, Marino supervised bookmaker Homer Gonzalez. Marino also supervised Nicholas' operation of floating black jack games and provided a juice loan bankroll to Nicholas so that Nicholas could give juice loans to his customers.

In 1989, when Infelise became crew boss, Marino was promoted to one of Infelise's top assistants. As explained in the background section of this opinion, because of his high ranking position, Marino was considered one the persons capable of keeping the crew going in the event other high ranking crew members went to jail. *See* Government Exhibit 447 at 14-15.

Such extensive evidence clearly demonstrates that Marino served as a crew supervisor. In addition to assisting Infelise when Infelise became the crew boss, Marino supervised aspects of the crew's casino, bookmaker Homer Gonzalez, Nicholas' black jack games, and the crew's parlay card operation. Based upon this evidence, this court overrules Marino's objection to the assessment of a 3 point enhancement pursuant to Section 3B1.1(b).[26]

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[26] Marino does not contest that there were at least five participants or the enterprise was otherwise extensive as required to assign a Section 3B1.1(b) enhancement. Twenty defendants

(continued...)

C. *Section 5K2.0: Upward Departures*

The government argues that an offense level of 29 does not adequately reflect the seriousness of Marino's offenses and his involvement in the Ferriola Street Crew. Therefore, the government seeks various upward departures pursuant to Section 5K2.0. Section 5K2.0 provides:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines . . . the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached for that factor is inadequate.

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[26] (...continued)
were charged in the instant indictment and evidence was presented regarding the participation of other individuals in the Ferriola Street Crew's activities. Therefore, there is no question that there were more than five participants in this enterprise and that the enterprise was extensive.

1. Hal Smith's Murder

One circumstance which the Commission envisioned might warrant an upward departure is established in Section 5K2.1. This section provides that if death results from the commission of the charged offense, the sentencing court may increase the sentence above the authorized guideline range. Section 5K2.1 also explains:

> Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines; already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which the base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

U.S.S.G. § 5K2.1. The government contends that an upward departure from level 29 to 43 is appropriate in this instance so that Marino's sentence adequately reflects his involvement in Hal Smith's murder.[27]

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[27] According to the guideline's sentencing table, a total adjusted offense level of 43 requires a sentence of life in prison.

It is well established in this jurisdiction that relevant conduct can be considered for sentencing purposes. Application Note 1 to Section 2E1.1 provides that "where there is more than one underlying [RICO] offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). Application Note 1(1) to Section 1B1.1 defines the term "offense" as "the offense of conviction and *all relevant conduct* under § 1B1.3 (Relevant Conduct). . ." (emphasis added). And, Section 1B1.3, in pertinent part, provides that relevant conduct includes "all acts an omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense . . . or that otherwise were in furtherance of that offense."

The Seventh Circuit has established that a court must increase a defendant's base offense level to account for "relevant conduct" which was part of the same course of conduct or common scheme as the convicted offense, regardless of whether the defendant was charged with or convicted of carrying out those acts. *Duarte*, 950 F.2d at 1263; *United States v. Franklin*, 902 F.2d 501, 504 (7th Cir.), *cert. denied*, 111 S.Ct. 274 (1990). To increase a defendant's base offense level for uncharged or unconvicted activities, the court must find by a preponderance of the evidence that those activities were "part of the same course of conduct or common scheme or plan" as the convicted offense. *Duarte*, 950 F.2d at 1263.[28] A court mak-

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[28] Marino acknowledges that the standard of proof governing upward departures is the preponderance of the evidence standard. *See* Defendant Marino's Answer to the Government's Motion for Upward Departure at 4.

ing this determination "should explicitly state and support, "either at the sentencing hearing or (preferably) in a written statement of reasons, its finding that the unconvicted activities bore the necessary relation to the convicted offense." *Id.*; *see also United States v. Jewel*, 957 F.2d 224 (7th Cir. 1991); *United States v. Edwards*, 945 F.2d 1387 (7th Cir. 1991); *United States v. Morrison*, 946 F.2d 484 (7th Cir. 1991).

This court has already determined that sufficient evidence has been presented to hold Marino accountable for Smith's death. Moreover, this court is persuaded by the evidence presented that Smith's murder was part of the RICO conspiracy charged in Count 1 of the superseding indictment of which Marino was found guilty. The government has shown that Smith resisted the crew's efforts to impose a street tax on his independent bookmaking operation. At one meeting in February or early March 1984, Smith offered to pay the crew half of what DeLaurentis demanded. When DeLaurentis refused this offer, Smith said, "Now you get nothing." A very loud and public argument ensued during which DeLaurentis told Smith that he was going to be "trunk music." It was after this meeting that Infelise, Bellavia, and Marino began stalking Smith and it was approximately one year later that Smith was murdered.

Such evidence adequately demonstrates that it was Smith's refusal to pay the demanded street tax which motivated crew members to murder him. Not only would the crew lose money on Smith, but it risked having other bookmakers refuse to pay street tax if word got out that Smith was not required to pay it. Murdering Smith sent a very clear message to independent bookmakers and other individuals in the crew's territory that the crew

would not take "no" for an answer. The payment of street tax and control over gambling and related activities in the crew's territory was an integral part of the RICO conspiracy charged in Count 1. Therefore, since the government has proven by a preponderance of the evidence that Marino was part of the conspiracy to murder Hal Smith and Smith's murder was part of the plan of the RICO conspiracy of which Marino was found guilty, this court finds that Smith's murder can be considered for sentencing purposes.

This court also finds that an upward departure pursuant to Section 5K2.1 is warranted because the guidelines applicable to Marino's participation in the charged RICO conspiracy do not adequately account for his involvement in Smith's murder. This court does not find, nor has Marino demonstrated, that the guidelines applicable to Marino's offenses account for the death of a victim of the charged RICO conspiracy. Section 5K2.0 permits a sentencing court to upwardly depart in cases, such as this one, where aggravating circumstances exist which are not adequately accounted for by the applicable guidelines. Section 5K2.1 further supports this court's determination by identifying the death of a victim of the offense as an aggravating circumstance which may warrant an upward departure.

Having determined that an upward departure pursuant to Section 5K2.1 is appropriate, the remaining question is how high a departure is warranted. Upon careful review of the evidence, this court finds that a departure up to level 43 is appropriate because the circumstances surrounding Smith's death demonstrate that this offense is comparable to first degree murder. Smith refused to pay street tax to the crew during 1983-1984 and had a

loud argument about it with DeLaurentis in late February or early March 1984. According to Jahoda's trial testimony, it was after this meeting, in the spring of 1984, that Infelise, Bellavia, and Marino began stalking Smith. They had Jahoda set up meetings with Smith so that they could observe him. Then, on February 7, 1985, Jahoda brought Smith to his house, where Infelise, Bellavia, and Marino were waiting for Smith, pursuant to Infelise's February 5, 1985 order. As ordered, Jahoda and Smith drove Smith's car to Jahoda's house, Jahoda sent Smith into the house through the kitchen, and Jahoda never entered the house.

This testimony amply indicates that crew members carefully planned Smith's murder before he was brought to Jahoda's house on February 7, 1985. Infelise, Bellavia, and Marino spent several months stalking Smith before they set up the murder plan with Jahoda at a February 5, 1985 meeting. Since the evidence sufficiently demonstrates that Smith's murder was premeditated and that more than minimal planning was required, this court finds that it is appropriate to upwardly depart to a level comparable to the offense level for first degree murder—level 43. Therefore, Marino should be assigned an upward departure pursuant to Section 5K2.1 so that his total adjusted offense level is 43.[29]

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[29] The government also argues that their motion for an upward departure is supported by Section 5K2.8. This section provides:

> If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct in-

(continued...)

An upward departure to a level 43 has recently been approved by the Seventh Circuit in a case, like this one, where the defendant was not found guilty of murder, but the government proved by a preponderance of the evidence that the defendant was responsible for the victim's death. In *Masters*, the Seventh Circuit upheld Judge Zagel's determination that the defendant, who had been found guilty of conspiracy to murder his wife as part of a RICO conspiracy but not guilty of murder, should receive an offense level of 43 to account for his participation in his wife's murder. 978 F.2d 281. One of the three ways Judge Zagel calculated the defendant's offense score so as to reach a level 43 was to upwardly depart pursuant to Section 5K2.0 as this court is doing here. *Id.* at 283-84. The Seventh Circuit was not persuaded by the defendant's claim that such a departure was inappropriate because he was neither charged nor convicted of murder. As the Seventh Circuit explained:

> The guidelines start with the offense of conviction. (Citations omitted). But real-offense principles in-

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[29] (...continued)

> clude torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

U.S.S.G. § 5K2.8. While a departure beyond that which has already been assigned is not possible, this court notes that this section further supports the government's request for upward departure. The medical examiner testified at trial that Smith had at least 45 non-fatal wounds and injuries in the face, neck, and head areas. These wounds included contusions, bruises, stab wounds, and lacerations, and Smith's neck was slit. This testimony supports the government's assertion that Smith was tortured and such brutal and cruel conduct suggests an additional basis for the upward departure assigned to Marino.

> fluence not only the aggravating and mitigating factors but also the definition of relevant conduct under § 1B1.3.

Id. at 284. The Seventh Circuit determined that the only way for the defendant to overcome Judge Zagel's sentencing calculations would be to upset the Judge's finding that he was responsible for his wife's murder. *Id.* at 285. Since the Seventh Circuit agreed with Judge Zagel that the defendant's responsibility for his wife's murder had been proven by a preponderance of the evidence, the appellate court affirmed the sentence Judge Zagel imposed. *Id.* at 287.

Judge Zagel's second method for calculating the defendant's offense level in *Masters* provides additional support for this court's determination that a departure up to level 43 is appropriate. As Judge Zagel explained, Section 2E1.1(a)(2) refers to "the offense level applicable to the underlying racketeering activity." *Id.* at 284. Under this provision, the appropriate offense level to turn to is the guideline section for murder, Section 2A1.1, whose offense level is 43. *Id.* The Seventh Circuit found this comparison to be appropriate. *Id.*

2. Participation in Organized Crime

The government also contends that Marino should receive an upward departure for participation in organized crime.[30] As stated above, Section 5K2.0 establishes that an upward departure is permissible if the sentencing

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[30] While a departure above level 43 is not available under the guidelines, this court will still evaluate the government's request to ensure that there is a complete record of all potentially appealable issues with respect to Marino's sentence.

court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. U.S.S.G. § 5K2.0. The government argues that participation in organized crime is not adequately accounted for under the RICO sentencing guidelines. Therefore, the government contends that given Marino's extensive involvement in organized crime, such an upward departure is warranted in this case.

RICO is intended to be a broad statute which can be applied to legitimate and illegitimate enterprises. *See United States v. Turkette*, 452 U.S. 576, 580-81 (1981); *United States v. Lee Stoller Enterprises*, 652 F.2d 1313, 1316-18 (7th Cir. 1981); *United States v. Aleman*, 609 F.2d 298, 302-03 (7th Cir. 1979). However, contrary to the government's contention, the fact that RICO can be applied to both legitimate and illegitimate enterprises does not necessarily mean that RICO does not adequately account for a defendant's participation in organized crime. Indeed, when applied to illegitimate enterprises, this is exactly what RICO is intended to do. *See Aleman*, 609 F.2d at 303. The fact that RICO is part of the Organized Crime Control Act, whose stated purpose is to eradicate organized crime, lends strong support to this determination. *See* The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) (Statement of Purpose and Intent).[31]

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[31] The government also argues that the computation method for Section 2E1.1 demonstrates that a defendant's membership in organized crime is not accounted for under RICO. Section 2E1.1 requires that the base offense level for a RICO violation be the greater between 19 and the offense level applicable to

(continued...)

The government notes that this court has found and the Seventh Circuit has approved the assessment of an upward departure for use of a defendant's organized crime connections to further his criminal activities. *See United States v. Schweihs*, 733 F. Supp. 1174 (N.D. Ill. 1990), *aff'd in part and rev'd in part*, 971 F.2d 1302 (7th Cir. 1992). However, this court's determination in *Schweihs* that such an upward departure was appropriate does not necessarily mean that such a determination is appropriate in this instance. Unlike Marino, the *Schweihs* defendant was not convicted of a RICO violation. Rather, he was convicted of conspiracy to commit extortion, attempted extortion, and solicitation to commit a crime of violence. It was the fact that these offenses did not account for one's involvement with organized crime, like a RICO violation, that persuaded this court to assess an upward departure in that case. *See Schweihs*, 733 F. Supp. at 1179. Here, RICO adequately accounts

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[31] (...continued)
the underlying racketeering activity. The computation of the offense levels for each underlying activity is made by assessing each offense and its adjustments as if each underlying activity was a separate offense. *See* Section 2E1.1, Application Note 1. According to the government, the total offense level for a RICO violation is established by reference to the underlying racketeering acts committed by a defendant, without even considering the defendant's membership in organized crime. However, as this court has noted, RICO was established, in significant part, to assist in the eradication of organized crime. This court is not persuaded that the method for calculating RICO offense levels overcomes this fact and warrants assessing defendants an upward departure for their participation in organized crime.

for defendants' membership in organized crime.[32] Therefore, the government's motion for an upward departure for participation in organized crime is not warranted.[33]

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[32] Marino argues that the government has not adequately demonstrated that he was involved in organized crime. This court disagrees. Marino was convicted of racketeering offenses which included the collection of unlawful debts and running illegal gambling operations. The evidence presented at trial, particularly regarding the collection of unlawful debts, amply demonstrates that Marino used his connections with organized crime to further the commission of his offenses.

[33] The government further argues that if this court does not accept in whole or in part the government's guideline calculations and/or recommended departure for Smith's murder, an upward departure would be warranted pursuant to Section 3D1.4 (Determining the Combined Offense Level). The background notes to Section 3D1.4, in pertinent part provide:

> In unusual circumstances the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. . . . Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. . . .

The Guidelines establish that such an upward departure may be warranted where the number of underlying offenses is so large that it results in significantly more than the five units employed under Section 3D1.4. *See* Section 3D1.4, Background Notes. As the government suggests, Marino's offenses result in 10 1/2 units, twice the number of units available under Section 3D1.4. Therefore, this court finds that given that Marino's offenses total significantly more than 5 units, Section 3D1.4 provides an additional basis for an upward departure.

3. Defendant's Ex Post Facto Objection to Upward Departures

Marino argues that upward departures pursuant to Sections 5K2.1, 2A1.5, and 3D1.4 are not appropriate because they violate his rights under the ex post facto clause of the Constitution. Smith was murdered in 1985 and the indictment in this case was returned in February 1990, but Section 5K2.1 did not become effective until November 1987, Section 2A1.5 did not become effective until November 1990, and Section 3D1.4 did not become effective until November 1991. Marino argues that he should not receive a substantial increase in his punishment based upon subsequent amendments to the guidelines.

While the appellate court did not directly rule on this issue, the Seventh Circuit upheld the propriety of relying on Section 2A1.5 in a case, like this one, where the offenses were committed before the guidelines were amended, but the sentencing took place after the amendments. *Masters*, 978 F.2d at 284. In response to the *Masters* defendant's ex post facto claim, the Seventh Circuit recognized that Congress requires courts to apply the guidelines "that are in effect on the date the defendant is sentenced." *Id.* (citing 18 U.S.C. § 3553(a)(4). The Seventh Circuit also cited *United States v. Bader*, 956 F.2d 708 (7th Cir. 1992), a case which was critical of applying ex post facto analyses to the guidelines. Moreover, the Seventh Circuit determined that ex post facto issues really were not at issue because the sentencing court had determined that the amendment which established Section 2A1.5 clarified, rather than changed, the law. *Id.*

The Seventh Circuit's response to the *Masters* defendant's ex post facto argument is instructive in this in-

stance. Not only does the appellate court's determination establish that Section 2A1.5 can be applied retroactively, but it indicates that Sections 5K2.1 and 3D1.4 can also be applied retroactively. As the appellate court noted in *Masters*, Section 3553(a)(4) requires sentencing courts to apply the guidelines "that are in effect on the date the defendant is sentenced." 978 F.2d at 284. Moreover, the Seventh Circuit has been critical of applying ex post facto analyses to the guidelines. *See Bader*, 956 F.2d at 709.[34] Since Sections 2A1.5, 5K2.1. and 3D1.4 will be in effect at the time of sentencing, this court finds that their application to Marino's sentence does not violate his rights under the ex post facto clause.[35]

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[34] As the Seventh Circuit explained in *Bader*:

> Although the guidelines influence the exercise of discretion within the statutory range, judges may depart at appropriate times. On this understanding, a change in the sentencing guidelines is no different from, say, the institution of a get-tough policy under which the prosecutor no longer accepts pleas to lesser offenses, or the appointment of a new judge who favors longer sentences, or a change in the guidelines for parole (citation omitted), or a decision by the President to cease commuting the sentences of a class of felons. All of these may increase the time a criminal spends in prison without transgressing the ban on ex post facto laws.

956 F.2d at 709.

[35] In addition, the application of Section 5K2.1 does not violate Marino's rights under the ex post facto clause because the RICO conspiracy of which Marino was convicted continued through the return of the superseding indictment in this case in 1990. Despite the fact that Smith was murdered in 1985, the continuation of the RICO conspiracy beyond the dates when the guidelines and Section 5K2.1 were promulgated suggests that these guideline provisions were not improperly

(continued...)

4. Summary

In sum, this court finds that Marino's total adjusted offense level is 43. However, since none of the counts of which Marino was convicted bears a maximum penalty of life imprisonment, this court finds that the best way to effectuate the sentence described above is to impose consecutive sentences on all counts of which he was found guilty. This determination comports with Section 5G1.2(d), which provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, to the extent otherwise required by law.

This calculation method has also been permitted by this Seventh Circuit. *See Masters*, 978 F.2d at 1369.

D. *Objections to Statements in the PSI*

1. Section 3E1.1: Acceptance of Responsibility

Marino also raises numerous objections regarding computations for other offenses of which he has been found

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[35] (...continued)
applied retroactively. The upward departure assessed against Marino applies to the RICO conspiracy of which he was convicted that continued through August 1990. Therefore, Marino's rights under the ex post facto clause of the constitution are not violated by the application of Section 5K2.1. *See United States v. Mettler*, 938 F.2d 764, 768 (7th Cir. 1991).

guilty.[36] Marino objects to the following statement in his PSI:

> The defendant has chosen not to discuss or provide a written statement regarding his participation in the instant offense due to an appeal. In the light of this it does not appear the defendant has accepted responsibility for his criminal conduct.

PSI at 27, lines 1031-35. Marino argues that his actions since his arrest in February 1990 demonstrate that he has accepted responsibility for his actions. According to defendant, he has been in custody since charged, he attended trial, and he has been in contact with Assistant United States Attorneys, FBI and IRS agents, and Illinois police officers. Marino has been advised by his attorneys not to submit a statement of this case due to the expected appeal of this case. Marino claims that it is not appropriate to penalize him for protecting his rights on appeal.

Section 3E1.1 provides for a two point reduction where a defendant clearly demonstrates acceptance of responsibility for his offenses. It is clear to this court that Marino is not entitled to such a reduction because he has not demonstrated a recognition or affirmative acceptance of responsibility for his criminal conduct. Marino has not acknowledged his responsibility nor shown remorse for the offenses of which he was convicted. Contrary to his contention, Marino is not being punished for choosing not to submit a written version of the offense. Rather, defen-

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[36] While these remaining objections have no bearing on Marino's sentence because these offenses are overshadowed by Marino's offense level for Count 1, for purposes of a clear record, this court will review Marino's and the government's remaining objections to the PSI.

dant is not being rewarded with a reduction pursuant to Section 3E1.1 because his actions do not demonstrate that he is entitled to such a reduction. Attending trial and being in custody are not the type of affirmative steps which warrant a reduction under Section 3E1.1.[37] Marino's decision not to submit a written statement of the offense has no bearing on this determination.

Marino claims that he is not attempting to obtain a reduction pursuant to Section 3E1.1, but he is only trying to demonstrate that he has been a respectful and well behaved defendant. However, this has no bearing on the appropriateness of the probation officer's statement and the determination of whether Marino has accepted responsibility for his criminal conduct. As stated above, Marino is not being punished for choosing not to submit a written version of the offense. And, this court is not persuaded that the disputed statement in Marino's PSI is inaccurate or inappropriate. Therefore, Marino's objection to the above noted statement in the PSI is overruled.

2. Factual Inaccuracies in the PSI

Marino also argues that there are factual inaccuracies in the PSI which should be corrected. For example, the

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[37] Application Note 1 to Section 3E1.1 identifies factors which may be considered when determining whether a defendant has accepted responsibility for his criminal conduct. Factors include, but are not limited to: truthfully admitting the conduct comprising the offense of conviction, voluntarily withdrawing from criminal conduct, voluntarily making restitution, voluntarily surrendering to authorities, and voluntarily assisting authorities in the recovery of the fruits and instrumentalities of the offense. U.S.S.G. § 3E1.1, Application Note 1.

PSI states: "According to the superseding indictment, the criminal activity began from in or about late 1974 up to and including the date of the indictment, August 29, 1990." PSI at 1, lines 29-31. Marino contends that he was arrested on February 7, 1990 and has either been in custody or out on bail, with the condition of house arrest, since that time. Since he was removed from the conspiracy by his arrest in February 1990, Marino claims that the above noted statement should be stricken because it incorrectly suggests that he participated in the conspiracy for approximately 6 months after his arrest.

Contrary to Marino's contention, the disputed statement is not inaccurate. The conspiracy and the related criminal activity charged in Count 1 continued through the return of the superseding indictment in August 1990. Marino's alleged inability to actively participate in the conspiracy after his arrest in February 1990 does not change this fact. A defendant's arrest or incarceration does not necessarily mean that the conspiracy with which he was involved nor his participation in that conspiracy did not continue. *See Pinkerton v. United States*, 328 U.S. 540 (1946). Therefore, this objection to the PSI is overruled.

Marino also argues that the following statement in the PSI is not accurate:

> The United States Probation Offices assigned to this investigation met with the investigating case agents on this case, to include Special Agents John Mallul of the Federal Bureau of Investigation, Lynette Redruer, Tom Moriarty and Mark Lischka of the Internal Revenue Service. The agents indicated that all of the defendants in this case knew or were fully aware of what they were getting into and what they were getting involved with. All defendants were

> aware of Jahoda's cooperation. All defendants were given ample opportunity to cooperate with the government prior to their indictments. Despite this, everyone refused.

PSI at 2-3, lines 84-94. Marino claims that the agents in question were not qualified to say "that all of the defendants in this case knew or were fully aware of what they were getting into . . ."[38], and the agents' statements were not accurate. However, as the government suggests, Marino fails to explain how the above noted statement is inaccurate. The evidence presented at trial, including victims' testimony and tape recordings of defendants' conversations, clearly demonstrates the nature of the conspiracy and other charges against defendants, and defendants' knowing participation in them. Therefore, Marino's objection to the inclusion of this statement in his PSI is overruled.

Marino also claims that the following portion of the PSI contains inaccuracies:

> In terms of culpability, the case agents ranked all of the defendants on a six tier hierarchy. The first level was Joseph Ferriola, (who is deceased); on the second level is Rocco Infelise, (boss); on the third level is Salvatore DeLaurentis, (top assistant); Robert Bellavia, (supervisor); and Louis Marino, (juice loan, parley cards supervisor). The fourth level is William Jahoda (day-today manager). The fifth level consists of William D. DiDomenico, (agent, wire room supervisor and later promoted to DeLaurentis' right-hand man). Jahoda was demoted and DiDomenico took Jahoda's place. Also on the fifth level is Michael Zitello, (agent,

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[38] Comments of Louis Marino on the Presentence Report, and Request for Hearing at 4, ¶ B3.

and wire room supervisor); Robert Salerno, (collector of street tax, juice loans); Michael Sarno, (collector of street tax, juice loans, parley cards). On the sixth and last level is Robert Garrison, (50/50 bookmaker and wire room clerk); James Coniglio, (agent, who settled up with bettors and also collected street tax); Paul Spano, (juice loans, owns/trucking company); Ronald DeRosa, (agent and wire room clerk); James Nicholas, (50/50 bookmaker and casino-games); Thomas McCandless, (clerk and 50/50 bookmaker); Frank Maltese, (agent, also fixed court cases); and the defendant Robert Covone, (agent).

PSI at 3, lines 95-115. Marino contends that Jahoda was a key figure in the crimes he claims were committed by Marino. Therefore, Marino questions why he has been placed in the third level and Jahoda in the fourth level of the six tier hierarchy of culpability.

The evidence adduced at trial clearly demonstrates that while Marino began in a subordinate position to Jahoda, Marino advanced until he became one of the three overall supervisors of the Ferriola Street Crew's activities. The following conversation between Bellavia and Jahoda on October 30, 1989 supports this determination:

> Jahoda: So I skipped the link of command. I really didn't have time. I didn't get the information. I met the guy at 9 in the morning.
>
> Bellavia: You know what happened? It got to the point now where he's [Infelise] so busy, and there's guys like me, Louie and Solly. . .
>
> Jahoda: Well, yeah, I appreciate that.
>
> Bellavia: It went into that. Just so you know. (Inaudible).
>
> Jahoda: I do. I do.

Bellavia: And he's up here now, and it's a little hard, not that you're not that important. It's there's just so many other fucking things going on. You can't handle everything.

Jahoda: I don't even want to bother the man. But I also don't want anybody to look at me as any kind of problem.

Bellavia: Yeah, no, I don't think it ever comes into thought.

Jahoda: Because I know when I compliment you and Louie on the promotions, as well as Solly, . . .

Bellavia: Yeah.

Jahoda: . . . I think it's terrific.

Government Exhibit 457 at 11-12. Other recorded evidence further indicates that Marino held a supervisory position in the crew. For example, in the following October 18, 1989 recorded conversation, DeLaurentis indicated that he could not interfere with Nicholas' wagering activities because Marino supervised him and Marino could not interfere with Jahoda's activities because DeLaurentis supervised him:

Jahoda: Plus this other, and I can't think of another word, I don't know, rivalry's the wrong word, but just, Jimmy [Nicholas] wants a bigger piece of the pie.

DeLaurentis: Well, Jimmy's got hot nuts, you. know. He's got a . . .

Jahoda: Yeah, but he's doing dead wrong.

DeLaurentis: Between you and me now.

Jahoda: I know he does. But he's so dead wrong. he's so out of line. But I can't talk to him.

DeLaurentis: He thinks he's going to set the world on fire now that he got an OK, you know what I'm saying? It'll come done. It'll come down in the long run.

Jahoda: Well, one thing that would look dumb down the road, is that we got the same dealers at the same game, but there ain't nobody else that I know of, so I mean, I don't mind, I don't mind that at all.

DeLaurentis: See, I can't interfere with that too much, because he's Louie's, you know what I mean?

Jahoda: I know. I know.

DeLaurentis: Like Louie can't fuck with you. You know it's the same thing.

Government Exhibit 444 at 26-27. DeLaurentis again referred to Marino's supervisory position with respect to maintaining a juice loan bankroll in the following October 18, 1986 conversation with Nicholas Koritsaris:

DeLaurentis: He, ah, you know his cousin, the bull dog, Mike [Pascucci]?

Koritsaris: The guy you used to come with, an older guy?

DeLaurentis: No. No. No. Look likes he could bite a hole through the wall. Looks like a fucking tank.

Koritsaris: Yeah.

DeLaurentis: He said he gave it [juice money] to him. To put out. And he, you know, he gets blues.

Koritsaris: Blue . . . (inaudible).

DeLaurentis: So, Joe says I got it from Mike. It's Mike? Who's the fuck told Mike to do anything in Lake County. he says well he's with Louie [Marino]. I said I don't give a fuck if he's Jesus Christ. You don't fuck and come here and give you money. I says and you're fucking lying because you told George to say to was for free, there was no interest. I mean

Pete and you told him not to let me know about it. So I says you tell that fucking cousin of yours to call me. So he called me and I says "listen you bulldog motherfucker." See he's a real tough guy.

Koritsaris: Yeah.

DeLaurentis: Yeah. You, you know can't let him get the first edge on you.

Koritsaris: Yeah.

DeLaurentis: I says "you bulldog mother fucker," I ever catch you in fuckin' Lake County again I'll knock your mother fuckin' head off. He says 'well what about my money?' I says it's in my pocket. You wanna come and get it? He says well it ain't my money, it's Louie's. You want me to tell Louie that. ! say you tell anybody the fuck you want. Okay. So now he's figuring me and Louie will get in a beef, right. So, ah, he calls B.J. [Jahoda] for help. So B.J. says, fuck I can't help you with Solly. What the fuck can I do with Solly. He say well I got to talk to somebody, so he says I'll have somebody else call you. So Rocky called already he says Mikey, I'm going to tell you for the last time, when Solly says shit, you fucking squat 'cause if I turn-him loose, he will hock you fucking head off.' He says one word from, the only reason he didn't hock your fucking head off already, he says turban. He says he wanted to put a fucking turban on your head. You how what that is don't ya?

Koritsaris: No.

DeLaurentis: You break a guy's head, they have to wrap it.

Koritsaris: (Laughs).

DeLaurentis: Fucking gauze. He says if it was up to Solly, you'd have been wearing a fucking turban already. He says now I am telling you, you fucking get out of line again, he's got the "Go" sign now. He says

if you fart in that fucking county and you don't tell him about it first, he will put a fucking turban on your head. So he's shitting, nobody come for the fucking money.

Koritsaris: Is that right? Yeah, but did Louie, Louie know anything about it or he was just bullshitting?

DeLaurentis: No, Louie didn't how nothing about it.

Koritsaris: He was bullshitting?

DeLaurentis: Yeah. ! mean Louie gives a, here like let's say I give you $5,000 to put out, I don't know who you are giving it to.

Koritsaris: Right. That's not . . .

DeLaurentis: Yeah. Louie don't give a fuck. He owes Louie the money now. But Louie and me are the same people. You how what I mean?

Government Exhibit 327 at 1-3.

In addition, on October 21, 1989, when DeLaurentis expressed his concern to Jahoda that crew leaders may soon be arrested, he proposed Marino as one of the people capable of keeping the crew's activities going while other leaders where in jail:

DeLaurentis: You know, I'm going to try and keep this thing going. Let's say they scoop us. I'm putting guys in now to keep this fucking thing going. One thing is going to jail and you still got everything going, and you know that, like you did last time.

Jahoda: Oh, yeah.

DeLaurentis: That's another thing to go we're all closed up, you know. So I'll try to get a couple of guys in line nobody's home, B. You know, either me or Rocky or Louie, one of us, it will be a lot better if one of us is out on the street.

Jahoda: True.

> DeLaurentis: If we're all gone, then the guys behind us. We might lose a little money, somebody might steal a little along the way, but we still got it going.

Government Exhibit 447 at 14-15.

In light of the evidence regarding Marino's supervisory position over many of the crew's activities, this court finds that Marino should not be placed in a subordinate position to Jahoda as Marino suggests. As DeLaurentis indicated, Marino supervised Nicholas just as DeLaurentis supervised Jahoda. Since such evidence adequately demonstrates that Marino held a higher position in the Ferriola Street Crew than Jahoda, Marino's objection to this suggestion in the PSI is overruled.

Marino contends that there are also several inaccuracies in the following statement in the PSI:

> A group interview was held between the United States probation officers assigned to this investigation and Assistant United States Attorney Mitchell A. Mars, David D. Buvinger, and Mark S. Prosperi. The Assistant United States Attorneys basically agreed with the case agents ranking of the defendants in terms of culpability, with a few exceptions. Two more tiers were added to make the hierarchy an eight-level hierarchy. On the sixth level, there is Spano who used his business as a front. Maltese, who is a public official and had political ties; and Nicholas who is reported as the son-in-law of Ferriola and who was involved in the street crew activities for a long period of time. On the seventh level is Coniglio and Covone. On the eighth and last level is Garrison, McCandless, and DeRosa who is viewed as the least culpable.
>
> Although the defendant was a strong-arm collector for the crew, to the government's knowledge the de-

> fendant did not or was not in possession of any weapons other than on one occasion in a restaurant when the defendant put a knife in Hospodar's ribs. On another occasion, the defendant shook someone who he had hanging upside down. Other than that, the government indicated they have no knowledge of any serious bodily injury inflicted by the defendant, with the exception of the defendant's participation in the Hal Smith murder. The government is of the opinion that the defendant participated in the Hal Smith murder, based upon preponderance of the evidence, to include Jahoda's witnessing and tape recordings implicating the defendant. Assistant United States Attorney Mitchell A. Mars indicated for the calendar year 1983, the defendant reported a combined income in the amount of $36,762. However, the defendant made in excess of this amount, whereas, he did not report an additional $20,000. Mr. Mitchell Mars indicated that the defendant's participation in the instant offense lasted from early 1979 to the date of the indictment.

PSI at 3-4, lines 122-158. Marino argues that this statement does not make it clear that the knife involved in the Hospodar incident was a utensil from the restaurant where they had a meeting and that, according to Hospodar's testimony, Marino did not put a knife to Hospodar's ribs to hurt or coerce him.

The government agrees that the knife used in the Hospodar incident was an utensil from the restaurant where they were meeting, but fails to see how this fact exculpates Marino. This court agrees. As explained in the background section of this opinion, Hospodar was responsible to the crew for $12,000 in unpaid debts by his bettors. On February 6, 1981, Hospodar taped a conversation he had with Marino and DeLaurentis at a restau-

rant about the money he owed. In pertinent part, the following discussion took place:

> Manno: (Inaudible) . . . He got any money today?
>
> DeLaurentis: He ain't got nothin', nothin'.
>
> Marino: Nothin' . . . You motherfucker, I wish this was real, you motherfucker, I'll give ya' it right here ya' dirty mother, come on [at this point in the conversation, Marino picked a knife up off the table and stuck it in Hospodar's ribs].

Government Exhibit 304 at 5-7. Pulling a knife on Hospodar while threatening him clearly evidences Marino's desire to intimidate and coerce Hospodar into paying off his debt. And, contrary to Marino's assertion, Hospodar testified that he felt threatened by Marino's actions and, after this conversation, he thought Marino and DeLaurentis would "mess me up" if he did not pay off his debt. (Tr. at 1997-1998, Nov. 7, 1991).

Marino also contends that the record does not clearly indicate that Marino "shook someone who he had hanged upside down" as stated in the PSI. According to Marino, this was merely part of Jahoda's "colorful" testimony. The disputed description refers to the collection of money from Ray Cavanaugh. And, contrary to Marino's suggestion, this court finds that this description was not merely part of Jahoda's colorful testimony. Jahoda's testimony is corroborated by the following May 30, 1989 recorded conversation between Zitello and Jahoda:

> Jahoda: What the hell name jumped out of the blue? Cavanaugh. Ray Cavanaugh? Have I got that name right? Or is that a guy of yours that was with the Board of Trade or something?
>
> Zitello: Board of Trade guy, yeah.

Jahoda: Why did that name cross my mind? There's a guy I've never met. I remembered I talked to him one time on the phone.

Zitello: That was that fat fucker that ah, he was a friend, he knew, he was a friend of, ah of Burt's.

Jahoda: Butt Goldstein?

Zitello: Yeah.

Jahoda: Was this your account, though? Did you, did you pick him up through Burt when you were seeing Burt in those days?

Zitello: I must have, yeah. Cuz I remember, I was seeing him.

Jahoda: But is this the guy that Louie . . .

Zitello: Me and Louie went down there to grab him one day. I went right in, Louie didn't want to go in. I went right down on the floor and when they were in the pit that time. And I grabbed him at A-1 that time.

Jahoda: though?

What happened down at the Board of Trade, I thought that ah . . .

Zitello: Me and Louie went down to see him.

Jahoda: The story I heard was that Louie grabbed him and was going to throw him off the balcony or something?

Zitello: He grabbed, I went down in the pit and got him. That was it.

Jahoda: You brought him out of the pit.

Zitello: Dragged him out of the pit.

Jahoda: What do you mean dragged him, physically?

Zitello: Well, I had to grab him and get him out of the pit. He's a big, fat fucker, too. Not fat fat, but he

was pretty like bullish. Then Louie talked to him in the hallway, if I remember correctly.

Jahoda: But what happened with this Cavanaugh? Did we ever get him back on the sheet?

Zitello: We never got him back. We went ah, I think he eventually squared everything up. It took about a year or something.

Jahoda: And I don't know why, I just remember the story. I don't know whether it came from Burt or from you that Louie was going to throw this guy over the balcony. But I wasn't there. I never knew anything about it.

Zitello: Yeah, he grabbed him in the hallway.

Government Exhibit 402A at 1-3. Since there is sworn testimony and a recorded conversation which suggest that Marino shook Cavanaugh, this court finds that the description of this event in the PSI is appropriate. Therefore, Marino's objection to this description is overruled.

E. *Base Offense Levels for Racketeering Acts 6, 9(a), and 10(a)*

Marino next objects to the probation officer's determination of the base offense levels for Racketeering Acts 6, 9(a), and 10(a). According to Marino he was only convicted of intimidating Kenton Pielet, Ken Eto, and Patrick Gervais and not of extorting these men. Therefore, Marino argues that the proper guideline provision to apply is Section 2A6.1(a) (Threatening Communications), rather than Section 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) as the probation officer did in the PSI.

Section 1B1.2(a) provides that the proper guideline section to be applied is that which is most applicable to the offense of conviction.[39] A review of the evidence presented regarding Marino's attempts to obtain money from Pielet and Eto demonstrates that Section 2B3.2, and not Section 2A6.1, is the most appropriate guideline to apply to these offenses. As described in the background section of this opinion, Pielet began making street tax payments to the crew after Marino scared him by slapping him across the face. As further described in the background section of this opinion, Eto testified that he sought the crew's permission to open a Bolita game because he knew that if he failed to get permission before opening the game, he could very well get hurt. The crew permitted Eto to run the Bolita game on the condition that he pay street tax. Eto met Marino and Infelise monthly to pay off the street tax. And, with respect to Gervais, Marino fails to note that he was also convicted of Racketeering Act 10(b) which charged him with attempting to extort or extorting Gervais. This evidence demonstrates that Marino's participation in the intimidation of Pielet, Eto, and Gervais involved the use or threat of force as required to apply Section 2B3.2. Indeed, such threatening actions were characteristic of Marino's collection tactics.[40] Therefore,

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[39] Application Note 2 to Section 2E1.1 provides that if the underlying offense constitutes a violation of state law, the offense level corresponding to the most analogous federal offense should be used.

[40] For example, as previously explained, Marino stabbed Hospodar with a knife when collecting money from him. Marino also shook bettor Ray Cavanaugh to the point that Zitello thought Marino would throw Cavanaugh over a balcony. Marino also physically braced one of George Miller's delin-

(continued...)

contrary to Marino's suggestion, this court finds that this provision, and not Section 2A6.1, should be applied to these offenses.

F. *Base Offense Levels for Racketeering, Acts 11(a)-(b)*

Marino argues that Section 2A6.1, rather than Section 2B3.2, should also be applied to Racketeering Acts 11(a)-(b). Racketeering Act 11(a) charged Marino with intimidating George Miller and Racketeering Act 11(b) charged Marino with attempting to extort or extorting George Miller. However, there is no distinction between attempted extortion and extortion under the guidelines. Section 2X1.1(a) provides that the base offense level for an attempt is the same as the base offense level for the underlying substantive offense. And, there is no decrease in Marino's offense level pursuant to Section 2X1.1(b)(1) because Marino completed all the acts he believed necessary to successfully extort Miller. Therefore, as with Racketeering Acts 6, 9(a), and 10(a)-(b), this court finds that the appropriate guideline provision to apply to Racketeering Acts 11(a)-(b) is Section 2B3.2. Marino's objection to these guideline calculations is overruled.

G. *Further Objections to Statements in the PSI*

Marino also argues that the statement in the PSI that defendant was "found guilty by a jury . . . of three counts: racketeering conspiracy, illegal gambling conspiracy and submitting false and fraudulent tax returns,"

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[40] (...continued)
quent bettors up against a wall and then helped turn him upside down and take money from the bettor's wallet.

PSI at 26, lines 1000-1002, is not accurate. With respect to the tax count, Marino argues that the PSI should be amended to reflect that he was only convicted of submitting one false and fraudulent tax return rather than "false and fraudulent tax returns" as stated in the PSI. The government concedes that Marino was only charged and convicted of one count of filing a false and fraudulent tax return. Therefore, Marino's objection to this statement in the PSI is granted and this court orders the disputed sentence to be amended to reflect this fact.[41]

Marino also contends that the statement in the PSI that "the jury found that defendant agreed to . . . the intimidation and extortions of Patrick Gervais and George Miller, Jr," PSI at 26-27, lines 1003-1007, is not accurate and should be amended. As Marino suggests, the jury's verdict with respect to Racketeering Acts 10(b) and il(b) provide that he agreed to the "attempted extortion or extortion" of Gervais and Miller.[42] Therefore, Marino's objection to the above noted statement in the PSI is granted. This court orders the disputed sentence in the PSI to be amended to read as follows: "the jury found that defendant agreed to . . . the intimidation and attempted extortions or extortions of Patrick Gervais and George Miller, Jr."

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[41] For the same reasons, Marino also objects to the suggestion in the government's version of the offense that he was found guilty of intimidating and extorting Patrick Gervais and George Miller. For the reasons stated above, the government's version of the offense should be amended to reflect that Markno was found guilty of "intimidating and attempting to extort or extorting" Gervais and Miller.

[42] *See* Comments of Louis Marino on the Presentence Report, and Request for a Hearing, Appendix A.

> Marino also objects to the following statement in the PSI:
>
> The defendant has no prior convictions. Whether or not used as a front, it appears for the most part, the defendant has maintained legitimate employment during his participation in criminal activity.

PSI at 27, lines 1036-39. Marino argues that this statement is not accurate because it suggests that he may have used legitimate employment as a front for his criminal activity. This court finds that this statement may be prejudicial to defendant. This court modifies the second sentence of this statement as follows: "It appears for the most part, the defendant has maintained legitimate employment during his participation in criminal activity." Therefore, Marino's objection to this statement is granted.

H. *Objections to the Government's Version of the Offense*

Marino next raises various objections to the Government's Version of the Offense. Marino contends that it was inappropriate for the government to submit its version of the offense during the course of Marino's presentence investigation since he has elected not to submit his version of the offense due to the expected appeal of his conviction and sentence.

However, Local Rule 2.06E requires the government and defendant, should he choose to do so, to submit their versions of the offense to the probation office. Defendant's decision not to submit his version of the offense does not preclude the government from submitting its version of the offense to the probation officer. Moreover, this court agrees with the government that the submis-

sion of the respective versions of the offense "enables the Probation Office to make an accurate evaluation of a defendant's offenses, their complexity, the defendant's role in the offense, his relative culpability, and most recently, the appropriate guidelines to be applied. It is inconceivable that a Probation Officer would be able to make an accurate and worthwhile assessment of a defendant and his offenses, and comply with the mandates of Rule 32(c)(2) of the Federal Rules of Criminal Procedure,[43] without receiving the government's and defendant's versions of the offenses (unless of course it is required that Probation Officers be assigned to defendants prior to trial and sit through every trial in its entirety."[44] The government's version of the offense is clearly marked as such and Marino has provided this court with no reason to believe that his probation officer did not understand that the document was only the government's version of the case. Therefore, Marino's objection to the inclusion of the government's version of the offense is overruled.

Marino also makes various vague objections to the government's version of the offense such as that it includes statements that were not proven at trial and that the government's explanation of crew supervision is not accurate. However, after reviewing the evidence, this court finds that the statements in the government's version of the offense regarding the supervisory activities of crew members have been adequately proven. In addition, the

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[43] Federal Rule of Criminal Procedure 32(c)(2) governs the investigation of and preparation of presentence investigation reports.

[44] Government's Submission Concerning the Presentence Investigation Report for Louis Marino at 21.

statements at issue are part of a document clearly marked as the government's version of the offense. As stated above, Marino has provided this court with no reason to believe that the probation officer has treated this document as anything but the government's version of the case. Therefore, Marino's general objections to the contents of the government's version of the offense are overruled.

1. Extortion of Thomas Skryd

Marino next argues that the government improperly informed the probation officer that Marino participated in the extortion of Thomas Skryd because this charge was stricken and Skryd was not called as a witness by the government. As previously explained, it is well settled in this jurisdiction that relevant conduct can be considered for sentencing purposes. The Seventh Circuit has established that a court must increase a defendant's base offense level to account for "relevant conduct" which was part of the same course of conduct or common scheme as the convicted offense, regardless whether the defendant was charged with or convicted of carrying out those acts. *See Duarte*, 950 F.2d at 1263; *Franklin*, 902 F.2d at 504. To increase a defendant's offense level for uncharged or unconvicted activities, the court must find by a preponderance of the evidence that those activities were part of the same course of conduct as the convicted offense. *Duarte*, 950 F.2d at 1263.

As explained in the background section of this opinion, Skryd ran a money stakes poker game in the back of his tavern. After he had owned the bar for some time, Skryd was advised that the Chicago Outfit did not like the fact

that he ran this poker game. Skryd was then introduced to Marino who insisted that he pay the crew a street tax for operating his card game. Marino also offered to provide Skryd with protection from the police and perhaps could give him some legal work to do for the crew. Rather than paying Marino, Skryd stopped the card game at his tavern. Skryd attested to this information in a written statement he made under oath. *See* Thomas Skryd Statement, Government Exhibit 1. In this written statement, Skryd also stated that he knew Marino to be connected with the Chicago mob and to be moving up in the mob's hierarchy. Skryd further stated that he stopped the card game because he wasn't charging for it and it was not worth the money he would be paying Marino. Skryd stated that he stopped the card game because he "did not want to have any dealings with Louis Marino" and that he "never considered having the card game without paying Marino. I understood that Marino was part of the Chicago Mob and I was afraid of having any trouble with them." *Id.*

Skryd's statements are corroborated by two recorded telephone conversations. On August 14, 1986, Infelise and Maltese, in pertinent part, had the following conversation:

> Infelise: You know that guy, guy I told you to see that's got the place out in Lyons?
>
> Maltese: Yeah.
>
> Infelise: you didn't see him yet, did ya?
>
> Maltese: No, ah, he was, ah, in Wisconsin.
>
> Infelise: No.
>
> Maltese: And due back about three.
>
> Infelise: Ah, that's alright, don't see him.

Maltese: Oh, okay.

Infelise: Okay?

Maltese: Okay.

Infelise: Because ah . . . our pal knows him.

Maltese: Huh?

Infelise: Our pal knows him real good, Louie.

Maltese: Yeah.

Infelise: I'd rather have it that way, you know.

Government Exhibit 205 at 1. Two hours after Infelise told Maltese that Marino would handle Skryd, Infelise had, in pertinent part, the following conversation with Marino:

Infelise: Get, you can get a hold of that guy in Lyons though . . .

Marino: Huh?

Infelise: Get a hold of that guy, I told, ah, the other guy to forget about it.

Marino: Alright.

Infelise: Okay?

Marino: I'll get right on it.

Infelise: Alright.

Government Exhibit 206 at 3. Infelise's references to the "guy out in Lyons' adequately identify Skryd because Skryd's pub was located in Lyons, Illinois. Moreover, Infelise's direction to Marino to contact Skryd clearly supports Skryd's explanation of his association with Marino.

This court finds that Skryd's statement and these recorded conversations sufficiently demonstrate by a preponderance of the evidence that Marino was involved in

Skryd's extortion. Moreover, it is clear that Skryd's extortion was part of the same course of conduct as charged in Count 1 of the indictment. The collection of street tax from individuals such as Skryd was an essential part of the RICO conspiracy of which Marino was convicted. Therefore, this court finds that, contrary to Marino's assertion, Skryd's extortion can be considered for sentencing purposes.

2. Extension of Juice Loan Bankroll to James Basile

Marino also objects to the government's contention that he provided a juice loan bankroll to James Basile because the government dropped this charge against Marino and did not present evidence about it at trial. As stated above, this court can consider relevant conduct at sentencing which has been proven by a preponderance of the evidence. *See Duarte*, 950 F.2d at 1263. After reviewing the evidence presented by the government, this court is persuaded that there is sufficient evidence to prove by a preponderance of the evidence that Marino had a juice loan relationship with Basile.

Defendant Michael Sarno, who admittedly made collections from Basile for Marino and Infelise, stated the following in his plea agreement:

> [Sarno] understood from subsequent conversations with James "Duke" Basile, Marino, and Infelise that beginning in 1985 Basile was given several sums of money by Infelise and Marino to be used by Basile to finance "juice" loans to individuals. Basile was instructed to charge the "juice" customers interest at the rate of 5% a week. At the end of each month Basile was to turn in one half of the interest pay-

ments he collected to Marino and Infelise and keep the remaining half.

In the summer of 1986, Basile was instructed by Marino to pay future monthly juice payments to [Sarno]. From the summer of 1986 until June 1988 Basile made monthly juice payments to [Sarno] at various locations. Beginning in early 1987 these monthly payments were tape recorded. [Sarno] understood that he was collecting monthly interest payment from Basile equal to 10% of the amount Basile owed to Infelise and Marino and that Basile was using the principal to make usurious loans at an interest rate of 5% per week which was more than twice the legally enforceable rate of interest.

By the summer of 1987, Basile owed $6500 to Infelise and Marino. On August 18, 1987, [Sarno] told Basile that Infelise wanted to meet with him. On August 24, 1987, [Sarno]. Basile, and Infelise met at the Cottage Restaurant in Berwyn, Illinois. At this meeting and in the presence of [Sarno], Infelise told Basile that he wanted the $6500 in juice loan money to be collected and turned in to Infelise and that Basile was free to do whatever he wanted as long as he turned in to Infelise part of what he earned.

On November 19, 1987, Basile repaid $3500 in principal to [Sarno]. Following the receipt of this money [Sarno] met with Infelise and turned the $3500 over to him. On June 14, 1988, Basile repaid the final $3000 in principal to [Sarno] who turned this money into Infelise.

It was the understanding of [Sarno], Basile and the individuals to whom Basile was to make these juice loans that the possibility existed that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to

> cause harm to the person, reputation, or property of such debtors. . . .

Plea Agreement of Michael Sarno at 4-5, ¶ 5(a). The accuracy of this statement is supported by several tape recorded conversations. For example, in the following June 14, 1988 recorded conversation, Basile repays Sarno part of the juice loan money and discusses repaying the remainder of the money he owes to Marino and Infelise:

> Basile: Uh, here's the three thousand. That's three thousand (inaudible). Now, I, I gotta give you the juice for that. I just, I finally captured this kid. I'm so glad to be rid of this prick. . . .
>
> * * *
>
> Sarno: But Rocky says there was still a figure of there was uh, okay, off the top of my head, I don't wanna make no mistakes, it was 95 at the top . . .
>
> Basile: Right. Yeah. Yeah. Yeah. Yeah.
>
> Sarno: Okay. Okay he we made a deal for him for (inaudible).
>
> Basile: That's where the "G" note is see he fucked me out of a "G" note but I mean it's my fault cause it's my mistake . . .
>
> * * *
>
> Basile: So, but anyway, he told me that uh, he talked to Rock and uh, whatever and tell him . . . tell Rocky that I understand and, if you give me a couple more weeks and then I'll get the rest. At least I'm rid of this kid now. The other part's mine now. He owed me from football yet. He owes me thirty-one hundred from football. Plus what I got here. So that's what it was . . . see . . . I was . . . I was hung up with . . . with sixty-five for a long time so it was ninety-five, but he had an extra "G" note. 'Cause I had my fuckin' . . . I had my money out too and that's what I did.

Sarno: Believe me, (inaudible).

Basile: Oh, no, no, there's no, no, you know what, when I look at it logically, it's my responsibility. It was mine.

Sarno: Yeah.

Basile: If it gave it to somebody else got nothing to do with ah, Rocky.

Sarno: Well.

Basile: *Louie's right. Him . . . him and Louie gave me the money, I should fuckin' uh, be responsible. Uh, it's only two chunks.*

Government Exhibit 1039 at 1-3. Since this evidence adequately proves that Marino extended a juice loan bankroll to Basile, defendant's objection to the government's statements regarding Marino's relationship with Basile is overruled.

Marino next objects to the following statement in the government's version of the offense:

> In 1977, Robert Cooley fixed a murder trial for a crew member harry Aleman. On the instructions of Pat Marcy, Cooley paid $10,000 to Presiding Judge Frank Wilson to fix the case, and Aleman was subsequently acquitted in a bench trial. Cooley received the $10,000 from Pat Marcy which he paid to Wilson. Prior to the trial, Cooley met with Aleman and discussed the payment of the bribe to Wilson.

Government's Overview of the Offense at 18. Marino argues that Cooley was never called as a witness in this case and no evidence was presented to support the government's claims. Contrary to Marino's assertion, evidence was introduced at trial regarding Marcy's role in fixing a murder case for the crew. Jahoda testified at trial that on September 1, 1989, he traveled to Lake

Geneva with Infelise to meet with undercover agent Larry Kaiser. En route, Infelise called Marcy on his mobile telephone. Immediately thereafter, Infelise discussed crew attempts to bribe judges in Jahoda's case and Marcy's involvement in the disputed bribe:

> Infelise: Me, I don't want favors, B. I'd rather give him this [money to fix the case] and say it's going to be done. And you know it's going to be done and you don't owe a fucking thing, and this way they can't turn around, we tried, but we couldn't do it, you know what mean?
>
> Jahoda: Yeah, just pay your own way and pay a fair price.
>
> Infelise: Like when that kid had that murder case, me and Joe [Ferriola] came home and put up 50,000, 25 a piece. Some kid . . .
>
> Jahoda: Oh.
>
> Infelise: He's away. Now in my day the guy with the loot, did what he had to do. Kicked 25 grand. He gave it to this guy, the guy I just talked to [Marcy], right? He brought it to the old man, 'cuz he thought that's where the stuff come from. He didn't know Joe and I put it up, you know.
>
> Jahoda: (Inaudible) . . . really widen the circle.
>
> Infelise: The old man said to Joe? He says, I used that 25. Joe didn't know what the fuck he's talking about. Joe said, what 25 you, that 25, you know, I used it. Now Joe told me, he says Rock, we got, we got twelve five back a piece.
>
> Jahoda: What a way.
>
> Infelise: Our friend used it, so we . . .
>
> Jahoda: Back to square one.
>
> Infelise: It's just like the other guy got it.

> Jahoda: What a fucking story. What route that money took.
>
> Infelise: Well, we never knew we got it anyway, you know what I mean? I didn't give a fuck, fuck it, once we put it up we lost it.
>
> Jahoda: Fuck, that was really remarkable of the judge to do that.

Government Exhibit 421 at 27-28. Jahoda's sworn testimony and this recorded conversation provide sufficient evidence to support the government's statements regarding Marcy and the bribery of the judge presided over Aleman's murder trial. Therefore Marino's objection to this statement is overruled.

Marino also objects to the following statement in the government's version of the offense:

> Marcy's role in the Outfit was to attempt to fix criminal cases against Outfit members and associates by arranging the reassignment of the case to a corrupt judge. This was confirmed by both Cooley and Infelise. In a tape recorded conversation with Jahoda, Infelise related how he and Ferriola provided Marcy with $50,000 to fix another murder case.

Government's Overview of the Offense at 18. Marino argues that Cooley and Infelise never confirmed the disputed information in the government's version of the offense. Marino also questions whether there is a tape recorded conversation regarding Infelise and Ferriola providing Marcy with $50,000 to fix a murder case. As the recorded conversation described above clearly indicates, there is evidence which demonstrates that Infelise and Ferriola gave Marcy $50,000 to fix a murder case. *See* Government Exhibit 421 at 27-28. Jahoda also testified extensively regarding the efforts made to fix his

case. This testimony was corroborated by recorded statements by Infelise and DeLaurentis. For example, in pertinent part, the following conversation took place between Jahoda and DeLaurentis:

> DeLaurentis: Now this other thing, you go to court the 30th?
>
> Jahoda: Yeah.
>
> DeLaurentis: Alright, the guy that's handling it for us is going out of town the 28th, but it's being taken care of. If it's taken care of and it goes the way we want it to go, 10,000 is what it's going to cost. But we got to see what happens first. They don't get the money in front. They get the money after we see it.
>
> Jahoda: You just tell me how to take care of it, and it's done.

Government Exhibit 406 at 5; *see also* Government Exhibits 410-11, 415, 421, 435, 453. Such evidence adequately refutes Marino's contention that the government's statements in its version of the offense are nothing more than "unproved allegations." Therefore, Marino's objection to the inclusion of the disputed statements in the government's version of the offense is overruled.

3. Other Objections to the Government's Version of the Offense

Marino also objects to the following statements in the government's version of the offense:

> Similarly, the crew had another problem account in the person of a bettor named Ray Cavanaugh. Jahoda testified that he was told by Michael Zitello, the bookmaker who Cavanaugh bet with, that he and MARINO confronted Cavanaugh at the Board of

> Trade where Cavanaugh worked. Burt Goldstein, also abettor, saw this confrontation and told Jahoda that he thought MARINO was going to pitch Cavanaugh over the balcony at the Board of Trade. Jahoda testified that Cavanaugh paid up after MARINO and Zitello grabbed him.

Marino argues that these statements have not been properly substantiated because Jahoda, who testified about this matter at trial, only heard about it from Goldstein, Goldstein has denied witnessing such a confrontation, and Zitello has denied participating in such a confrontation.

This court has already determined that Marino shook up Cavanaugh when attempting to collect Cavanaugh's debt. Jahoda testified at trial that he was advised about this collection when it occurred Jahoda's testimony is adequately corroborated by Zitello's explanation of the events surrounding the Cavanaugh collection in a tape recorded conversation with Jahoda. In this conversation, Zitello confirmed that he and Marino physically confronted Cavanaugh at the Board of Trade. *See* Government Exhibit 402A at 1-3. Despite Goldstein's denial, such evidence is sufficient to prove by a preponderance of the evidence that Marino physically confronted Cavanaugh when collecting Cavanaugh's debt.

I. *Base offense Level for Racketeering Act 10*

The government also objects to the probation officer's calculation for the offense level for Racketeering Act 10, the intimidation and attempted extortion or extortion of Patrick Gervais. The government contends that Marino should be assessed a two point enhancement for obstruction of justice pursuant to Section 3C1.1 Marino provided

Gervais with police protection for his house of prostitution. This court has already determined that a Section 3C1.1 enhancement is warranted on this basis. Gervais paid $3,000 per month in street tax to cover the crew's interest and payoffs to individuals at the Lake County Sheriff's Department. Gervais testified at trial about these payments and the advance warnings of any raids or investigations of his house of prostitution that Marino and DeLaurentis promised he would receive. Gervais further testified that on one occasion he received such a warning. This testimony is corroborated by a recorded conversation between Gervais and DeLaurentis in which they discuss the warning Gervais had received. *See* Government Exhibit 315 at 9. Such evidence clearly demonstrates that Marino provided Gervais with police protection and advance warning of raids in an attempt to impede and obstruct the administration of justice in connection with the investigation and prosecution of the illegal activity. The addition of this two point enhancement pursuant to Section 3C1.1 brings Marino's offense level for Racketeering Act 10 up to 24. Under Section 3D1.4, a unitizing enhancement would be required bringing Marino's overall offense level, prior to the addition of the upward departure, up to 29 as previously established by this court.

J. *Relevant Conduct*

Finally, the government argues that the probation officer failed to include criminal conduct that was not specifically included in the indictment, but has been proven by the government in defendant's guideline calculations. As previously explained, Section 1B1.3 requires that all relevant conduct be used to determine the

seriousness of a defendant's offenses under the guidelines. The Seventh Circuit has established that a defendant's guideline calculations should include any uncharged conduct, dismissed counts, and even conduct which resulted in acquittals which has been proven by a preponderance of the evidence and which is part of the same course of conduct or common scheme or plan as the offense of conviction. *Duarte*, 950 F.2d at 1263.

1. Extension of Juice Loan Bankroll to Dominic Basso

The government contends that pursuant to Section 1B1.5, Marino's participation in loansharking and police protection activity, including the extension of juice loans to Dominic Basso, and juice loan bankrolls to Mike Pascucci and James Nicholas, should be included in Marino's guideline calculations. This court finds that sufficient evidence has been presented to warrant including these offenses in Marino's guideline calculations. Basso was a bookmaker to whom Marino extended a juice loan. This is confirmed by the following September 1, 1989 recorded conversation between Infelise and Jahoda:

> Infelise: Look at that kid that they says they got hooked up with Pete Rose, Dona Basso, whatever his name was.
>
> Jahoda: Yeah, what was he doing? Just trying to get a baseball ticket or something.
>
> Infelise: He met him in Tampa, Florida, you know, he never took, they got this kid booking 250,000. This kid never booked over 20,000 on a weekend as long as I know him.

> Jahoda: He's a ham and egger. I mean, he's in the business, out of the business. He has bad breaks and tough luck.
>
> Infelise: Right. Right. He's always fucking, on the hard, B.
>
> Jahoda: I don't know the kid.
>
> Infelise: You know, he's not a bad guy, I don't how. I know him, but I don't have nothing in common with him. But I know Louie's got him on the hard.

Government Exhibit 421 at 22-23. Since such evidence proves by a preponderance of the evidence that Marino extended a juice loan to Basso and the extension of such juice loans was part of the same course of conduct as the RICO conspiracy charged in Count 1, this juice loan should be included in Marino's offense calculation. Pursuant to Section 2E1.1, the proper offense level for this activity is 20.

2. Extension of Juice Loan Bankroll to Mike Pascucci

Sufficient evidence has also been presented to prove by a preponderance of the evidence that Marino extended a juice loan bankroll to Pascucci. As previously discussed with respect to Marino's supervisory position in the crew, DeLaurentis and Salvatore Koritsaris had the following discussion on October 18, 1986 regarding the juice loan bankroll that Marino extended to Pascucci:

> DeLaurentis: So, Joe says I got it from Mike. It's Mike? Who's the fuck told Mike to do anything in Lake County. he says well he's with Louie [Marino]. I said I don't give a fuck if he's Jesus Christ. You don't fuck and come here and give you money. I says and you're fucking lying because you told George to

say to was for free,' there was no interest. I mean Pete and you told him not to let me know about it. So I says you tell that fucking cousin of yours to call me. So he called me and I says "listen you bulldog motherfucker." See he's a real tough guy.

* * *

DeLaurentis: I says "you bulldog mother fucker," I ever catch you in fuckin' Lake County again I'll knock your mother fuckin' head off. He says 'well what about my money?' I says it's in my pocket. You wanna come and get it? He says well it ain't my money, it's Louie's. You want me to tell Louie that. I say you tell anybody the fuck you want. Okay. So now he's figuring me and Louie will get in a beef, right. So, ah, he calls B.J. [Jahoda] for help. So B.J. says, fuck I can't help you with Solly. What the fuck can I do with Solly. He say well I got to talk to somebody, so he says I'll have somebody else call you. So Rocky called already he says Mikey, I'm going to tell you for the last time, when Solly says shit, you fucking squat 'cause if I turn him loose, he will knock you fucking head off.' He says one word from, the only reason he didn't knock your fucking head off already, he says turban. He says he wanted to put a fucking turban on your head. You know what that is don't ya?

* * *

Koritsaris: Is that right? Yeah, but did Louie, Louie know anything about it or he was just bullshitting?

DeLaurentis: No, Louie didn't know nothing about it.

Koritsaris: He was bullshitting?

DeLaurentis: Yeah. I mean Louie gives a, here like let's say I give you $5,000 to put out, I don't know who you are giving it to.

Koritsaris: Right. That's not . . .

DeLaurentis: Yeah. Louie don't give a fuck. He owes Louie the money now. But Louie and me are the same people. You know what I mean?

Government Exhibit 327 at 1-3. Given that Marino's extension of a juice loan bankroll to Pascucci has been proven by a preponderance of the evidence and the extension of juice loan bankrolls was part of the same course of conduct as the RICO conspiracy charged in Count 1, this offense should be included in Marino's guideline calculation. Pursuant to Section 2E1.1, the base offense level for this offense is 20 and with a three point enhancement pursuant to Section 3B1.1(b) for Marino's supervisory role in maintaining this juice bankroll, Marino's offense level for this offense is 23.

3. Extension of Juice Loan Bankroll to James Nicholas

Sufficient evidence has also been presented to prove by a preponderance of the evidence that Marino extended a juice loan bankroll to Nicholas. For example, Jahoda testified at trial as follows:

Q Mr. Nicholas got out of jail in 1987?

A Correct.

Q Was that on the contempt time that he was doing?

A Yes, that's correct.

Q Now, when he got out of jail, did you learn whether he had any relationship with Mr. Marino?

A Well, he had a professional relationship with Marino at this time. Jimmy had mentioned to me on many times he had to settle up the other business, which was referring to the juice business, with Louie.

(Tr. 843, December 18, 1991 9:45 a.m.). Jahoda's testimony is corroborated by the following October 18, 1989 conversation between Jahoda and DeLaurentis:

> Jahoda: Plus this other, and I can't think of another word, I don't know, rivalry's the wrong word, but just, Jimmy [Nicholas] wants a bigger piece of the pie.
>
> DeLaurentis: Well, Jimmy's got hot nuts, you know. He's got a . . .
>
> Jahoda: Yeah, but he's doing dead wrong. DeLaurentis: Between you and me now.
>
> Jahoda: I know he does. But he's so dead wrong. he's so out of line. But I can't talk to him.
>
> DeLaurentis: He thinks he's going to set the world on fire now that he got an OK, you know what I'm saying? It'll come done. It'll come down in the long run.
>
> Jahoda: Well, one thing that would look dumb down the road, is that we got the same dealers at the same game, but there ain't nobody else that I know of, so I mean, I don't mind, I don't mind that at all.
>
> DeLaurentis: See, I can't interfere with that too much, because he's Louie's, you know what I mean?
>
> Jahoda: I know. I know.
>
> DeLaurentis: Like Louie can't fuck with you. You know it's the same thing.

Government Exhibit 444 at 26-27. This evidence is further corroborated by the following conversation between Infelise and Marino:

> Infelise: But, uh, Saturday.
>
> Marino: Yeah.
>
> Infelise: Jimmy the Greek [Nicholas].
>
> Marino: Yeah.

Infelise: He's got to give us 1,500 every Saturday. It's a special deal, he, he needed three 0 large. You know what I mean?

Marino: Oh yeah.

Government Exhibit 112 at 1.

Since this evidence proves by a preponderance of the evidence that Marino extended a juice bankroll to Nicholas and the extension of such juice bankrolls was part of the same course of conduct as the RICO conspiracy charged in Count 1, this activity should be included in Marino's offense calculation. Pursuant to Section 2E1.1, the proper offense level for this activity is 20 and with a three point enhancement pursuant to Section 3B1.1(b) for Marino's supervisory role in maintaining this juice bankroll, Marino's offense level for this offense is 23.

K. *Summary*

In sum, this court finds that Marino's total adjusted offense level is 43, his criminal history category is I, and his guideline sentence is life in prison. Since none of the counts for which Marino was convicted bear a maximum penalty of life imprisonment, this court will impose consecutive sentences on all counts to best effectuate this sentence.

Conclusion

For the reasons stated above, this court finds that Marino's adjusted offense level is 43 and his criminal history is IV, and his guideline sentence is life in prison. Since none of the counts for which Marino was convicted bear a maximum penalty of life imprisonment, this court will impose consecutive sentences on all counts to best effectuate this sentence.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: July 22, 1993

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 90 CR 87-1, 2,
v.	)	and 6
	)	
	)	
ROCCO ERNEST INFELISE,	)	
LOUIS MARINO and	)	Chicago, Illinois
ROBERT BELLAVIA,	)	August 19, 1993
	)	11:00 a.m.
Defendants.	)	
	)	Sentencing Hearing

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

For the Government:	MR. MITCHELL A. MARS MR. DAVID D. BUVINGER MR. MARK S. PROSPERI
For Rocco Ernest Infelise:	MR. PATRICK A. TUITE
For Louis Marino:	MR. GEORGE N. LEIGHTON
For Robert Bellavia:	MR. KEVIN A. MILNER
For the U.S. Probation Department:	MS. NIKITA FRANCE-SMITH MS. RENEE MULLIKEN MS. SHEILA CATHCART

Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street
Chicago, Illinois 60604
(312) 435-6891

THE CLERK: 90 CR 87, United States versus Infelise, Marino and Bellavia, sentencing.

MR. MARS: Good morning, Your Honor. Mitchell Mars and Mark Prosperi on behalf of the United States.

MR. LEIGHTON: George N. Leighton for the defendant Louis Marino, who is present in court, Your Honor.

MR. TUITE: Good morning, Judge. Patrick Tuite in behalf of Mr. Infelise, who is present in court as well.

MR. MILNER: Good morning, Judge. Kevin Milner on behalf of Robert Bellavia, who is also present in court.

MS. FRANCE-SMITH: Nikita France-Smith, U.S. Probation.

MS. MULLIKEN: Renee Mulliken, U.S. Probation.

MS. CATHCART: Sheila Cathcart, U.S. Probation.

THE COURT: All right. We're ready to. proceed now with the sentencings of Mr. Infelise, Mr. Bellavia and Mr. Marino.

With respect to the presentence reports, I know that counsel have all reviewed the reports because extensive objections were filed in this matter, but for the record I do need to inquire of first government counsel whether you've had an adequate time to review the presentence report as well as the supplemental various supplemental reports that were added to those reports.

MR. MARS: We have, Your Honor.

THE COURT: Mr. Leighton on behalf of Mr. Marino?

MR. LEIGHTON: Yes, he's had a full opportunity and has examined the presentence report and has consulted with the probation officer.

THE COURT: And, Mr. Marino, do you need any additional time to review the presentence reports that were filed in this case?

DEFENDANT MARINO: No.

THE COURT: And you've had an opportunity to discuss the presentence reports as well as the Court's rulings with Mr. Leighton?

DEFENDANT MARINO: Yes.

THE COURT: Do you need any additional time to speak with him?

DEFENDANT MARINO: No.

THE COURT: Mr. Tuite.

MR. TUITE: Judge, I've read it. I've gone over it with my client. We've obviously filed objections to it. He's had input on it. And we don't need any additional time. Our objections that were made before will stand as our objections now.

THE COURT: All right.

And, Mr. Infelise, you've reviewed the presentence reports as well as discussed the matters with Mr. Tuite?

DEFENDANT INFELISE: Yes, Your Honor.

THE COURT: Do you need any additional time to speak with him?

DEFENDANT INFELISE: No, Your Honor.

THE COURT: All right.

And Mr. Milner.

MR. MILNER: Judge, Mr. Bellavia and I have also had an opportunity to go over the presentence report. We've had ample time. We've made our objections of record. And we're ready to go forward.

THE COURT: All right.

And, Mr. Marino, you've have an—I'm sorry. Mr. Bellavia, you've had an opportunity to review the presentence reports?

DEFENDANT BELLAVIA: Yes, ma'am.

THE COURT: You've discussed them with Mr. Milner?

DEFENDANT BELLAVIA: Yes, ma'am.

THE COURT: You've had sufficient opportunity to go over them with him?

DEFENDANT BELLAVIA: Yes, ma'am.

THE COURT: Do you need any additional time to speak with him?

DEFENDANT BELLAVIA: No, ma'am.

THE COURT: With respect to any guidelines and various matters raised in the presentence report, as all counsel knows, this Court has written extensive opinions relative to each of the defendants and also supplemental opinions to objections to the Court's lengthy opinion. Are there any other matters that we need to resolve prior to proceeding with sentencing?

MR. MARS: No, Your Honor.

MR. LEIGHTON: None for Mr. Marino, Your Honor.

MR. MILNER: Nor for Mr. Bellavia.

MR. TUITE: Nor for Mr. Infelise, Judge.

THE COURT: All right.

So, Mr. Mars.

MR. MARS: Thank you, Your Honor.

As the Court's remarked, the sentencing of these three defendants has already been the subject of much litigation. And if the Court please, I'm just going to confine my remarks to concerns that I have in general as to all three defendants, and then I'll sit down and let the proceedings continue.

THE COURT: So, Mr. Leighton, if you choose, you may be seated during the government's remarks. It's up to you.

MR. LEIGHTON: What's that again?

THE COURT: If you choose, you may be seated during their remarks.

MR. LEIGHTON: Thank you, Your Honor.

THE COURT: They're going to address, as I understand it, all the defendants together and then perhaps make comments about individuals.

MR. MARS: That's correct, Judge.

THE COURT: And I'll hear from each defendant, his counsel and sentence everyone at the end of the proceeding.

MR. MARS: Thank you, Your Honor.

I guess up front, from reading all of the papers that have been filed and the Court's lengthy opinions and secondary opinions and subsequent opinions, I believe that the Court is going to be imposing the maximum penalties

upon all of the defendants here today, the three that need to be sentenced. And I submit to the Court that no other result is possible in this case given the extensive criminal conduct that these three defendants have committed.

I have to ask myself how often that we hear in the course of this trial and in the proceedings the chant from the defense that these were somehow men of honor. And, as Mr. Prosperi stated in his rebuttal arguments to the jury, if these are men of honor, what a perverse society we have become.

The trial showed that these three defendants were members of organized crime. They are in fact brutal, vicious; they have no regard for the sanctity and the dignity of human life. And we have bodies recovered from trunks of cars that attest to that. There's nothing admirable and at this stage in their lives I submit even redeemable in the three defendants that the Court must sentence today. They are in a sense violent parasites that have made their living off the weaknesses and failings of other human beings and they have preyed on those person's fears.

MR. LEIGHTON: Your Honor, I'm going to interpose an objection at this time, Your Honor, for the record.

Your Honor, we have submitted to you everything about this case in writing. You have written extensively about every facet of this case. I object to the speech by Mr. Mars. It isn't necessary. He doesn't have to tell you anything about this case. You presided over the trial. We went through a four-month trial. We know all about this case. What is the necessity of this speech by Mr. Mars?

We should get down to the question of your imposing the sentence, which you said you're going to do today.

I object to this.

THE COURT: All right. That objection is overruled.

You may proceed.

MR. MARS: Thank you, I submit to—

THE COURT: Because I'm assuming, Mr. Mars, you're not going over everything in this case.

MR. MARS: Not—

THE COURT: And this is just a brief comment that you're making.

MR. MARS: Exactly, Judge.

THE COURT: All right.

MR. MARS: My point is simply this, Judge: that these defendants have been convicted of extortion, loan sharking, bookmaking. Basically they've been convicted of being members of an enterprise that profited from those activities, from activities such as pornography, prostitution. This crew that they were members of suborned perjury. They corrupted or attempted to corrupt the criminal justice system through bribery. They hid millions of illegal profits. They were involved in tax evasion. They, meaning these three defendants, in fact also committed murder.

The three defendants are not new to the criminal justice system. Bellavia has three prior convictions committed early in his life. Infelise has, I believe, five prior convictions, and the last before this one was at the age of 48 for a heroin distribution violation. Mr. Marino has no prior convictions, but I submit to the Court that he's not

a first offender by any stretch of the imagination. He dodged the bullet when he was acquitted of the Hospodar extortion. He was providing muscle to the crew prior to that particular illegal activity, and he became a crew supervisor afterwards. And in fact it was not much more time after the acquittal in the Hospodar case that he was involved in the participation in the brutal murder of another bookmaker.

The defendants have committed crimes throughout their lives. The crimes for which they are going to be sentenced in this case were committed by them in their 40's and in their 50's and in Infelise's case in his 60's. And I submit to the Court that enough is enough.

And when I review in my mind—and I'm not going to get into the details of the case, but when I tried to review in my mind to encapsulate some of the damage that these defendants have done during the course of their lifetimes, I keep coming back to statements like Infelise's where he tells Jahoda in a recorded conversation that it's jail that separates the men from the boys, or he tells Jahoda that he's got—he, Infelise, has to take care of his soldiers out on the street, where we learn that really for these defendants jail is nothing more than a cost of doing business.

I come back to the recorded threats that Mr. Marino made against Steven Hospodar. And I don't think I have to explain that any further.

And more than anything else, Judge, I come back to the murder of Hal Smith. The thought of a human being's taking the life of another human being is haunting enough. This crime was not a crime of passion, as the Court well knows. It was a murder committed over

money. It was a murder that was calculated. It involved the torture of the victim. And for the life of me, Judge, I cannot comprehend where that sort of evil comes from.

And, of course, I come back to Bellavia's comment about that homicide where he tells Jahoda—they're discussing the murder. He tells Jahoda, "When those things are done, they're done, and I forget about 'em."

Your Honor, the sentencing guidelines call for life sentences for these three defendants, and the Court has ruled that it will impose consecutive sentences on all counts to effectuate those guidelines. But these sentences, the ones that the Court, I believe, will be imposing today, are not appropriate just because the guidelines say so. These defendants have committed terrible crimes over a long period of time. They are career criminals, and they are murderers. And society has a right to be protected from such criminals for as long as possible. If our system really belongs to all of us, if our system is designed to protect honest citizens, not just the people like these defendants, who can buy a piece of it, if our system is to protect all of us, Your Honor, then I submit to the Court that the sentences that I believe the Court will be imposing today are really the only sentences that are righteous.

That's really all I have to say, Judge. Thank you.

THE COURT: Thank you. Mr. Tuite.

MR. TUITE: Judge, I will be short. The Court has read our presentation, has disagreed with our position. I would only state this. We're not here to make headlines. We're not here to make sound bites for the press.

This case, I submit, is a perversion of all we've held sacred in this country. The defendants were detained

while they were only accused. They were merely accused, but our courts have said that you can detain people while they're awaiting trial.

To add insult to that, while they were being detained somebody in the federal government bugged their conversations with their lawyers, in violation of everything held sacred with respect to the attorney-client privilege, and nothing has been done about it. Your Honor has ordered the government to give you a report almost two years ago. And whatever they respect or what respect they have for the Court, they haven't done that yet. They're still running around over there talking to people at the MCC. And now the defendants stand to be sentenced for a crime for which they were never convicted.

If we mean anything in this system, and we'll take it up to higher courts, and we know the Masters decision in this court and the Court of Appeals, but they are here to be sentenced when Mr. Mars failed miserably to convict them of the murder of Smith. We beat them and beat them in the Plummer murder. They don't even bring that up because that was so weak it shouldn't have been involved in the case. But now when they get beaten in the courtroom, and the Jury, they can't convince twelve people of it, they say so what? We got a gambling conviction. Now sentence them for murder. I think it has turned the whole system on its head. Your Honor has ruled. We'll abide the Court's rulings. We'll take it to the Court of Appeals. We submit it's wrong. There should not be consecutive sentences. The gambling counts are subsumed in the RICO count. I submit that Your Honor's recent opinion said that the gambling required something that the RICO did not. The indictment shows that the gambling counts, the gambling racketeering acts in

Count 1 are the same as the substantive counts that are in the—that you are to sentence as well.

There shouldn't be consecutive sentences. My client is 70 years old with a heart condition. And if you stack them all, 20 years is a life sentence for him anyhow, and that's what's in Count 1. I submit you should not sentence the defendant consecutively. We should not continue to add to the perversion that this case has shown to everyone. And we ask that you sentence without the consecutive sentences that the government has requested.

THE COURT: Let me have Mr. Infelise make any statement he wishes, Mr. Tuite, before—

MR. TUITE: Thank you.

DEFENDANT INFELISE: Your Honor, thank you for letting me come up here.

Ironically, today, Your Honor, the 17th of August—the 19th of August is Mr. Jahoda's birthday, and I would like to send him a happy birthday. I know the prosecutors would do that for me.

Now I'd like to tell you, I believe in law and order, Your Honor. I believe in justice. I believe in the jury system. I believe in the courts. And I believe in the prosecutors prosecuting vigorously. But I also believe the prosecutors should defend the defendant's right, which these prosecutors here never did once in this whole case.

They brought witnesses on the stand that were worse than the defendants they were trying, paid informers, people that got caught with 200,000 to go buy narcotics, and they let them go, switch for parlay cards. And we could go on and on, Your Honor. There's no sense of that.

Now, I really don't think we had a fair trial, Your Honor, from day one. From our beginning when we had bond hearings, we had three or four bond hearings, Your Honor denied us. We went to the appellate court. They sent it back asking you to reconsider. Under no condition, you said. You said we would remain in custody.

Then while we were in the MCC we were bugged, Your Honor. It was in the middle of the week or something when we heard. And the following Monday we come to court, and Your Honor on her own volition allowed us to go five days a week to our lawyers' office or to the tape room here on Jackson Boulevard to confer with our lawyers and listen to tapes. Now, Your Honor must have thought it was a serious thing because no one asked her for this. She did it upon her own volition. Then the government—we asked the case to be continued, and Your Honor denied that but said she'd open it up if she ever heard anything. And the government agreeing, knowingly, if we ever had a hearing and won it, they could never appeal it no more. So they never wanted this hearing to ever happen. And then the government asked for 35 days, went into two years. They're still investigating. And nothing has been revolved.

Then we started trial. During the trial—I'll just go over one part of it. There's a lot of different things that happened, but what's mostly in my mind is the jurors. First we had three jurors who got sick. We started with 18 jurors. Three got sick. That left 15. Then one of the marshals says he heard a juror make a derogatory remark. The jurors were all polled. They says they never heard it. But she was excused.

Then two jurors had a love affair. Your Honor brought them in your chambers, and you listened to them, and

you allowed them to stay on. The following week they have another spat, and Your Honor excused one of them, and we asked you to excuse both of them, but Your Honor would not.

A little while later one of the jurors had to have a serious operation, and we took an extra day off so she could have a long weekend: Thursday, Friday, Saturday and Sunday. When she came back, we asked Your Honor to discharge her because we believed her state of mind, she wouldn't be just right to listen to the questions and everything else. And Your Honor denied our request. But during the whole trial when witnesses got on the stand, I heard Your Honor tell the jury this is not for the truth, this is the state of mind. So what state of mind could this juror have been in after that operation she had?

Then the day we got found guilty by the jurors on some counts, some counts were hung jurors, the defense attorneys and the prosecutors and yourself had a side bar and were very concerned about the inconsistencies in these verdicts. And Your Honor even said, I really don't know how to pose the questions to the jurors because I don't want them to think they made a mistake, so it was all agreed on whatever it was, and that was left up in the air.

Three days later a juror come forward, she and Mr. Goudie on TV, and she—of Mr. DeLaurentis, and she says, We didn't vote that way, we didn't vote that way. So Your Honor called them in and polled them individually. Our lawyers asked Your Honor to ask them if they made any other mistakes, not how they reached their verdict and whatever happened, just—but you only held it to Count 8. And when you come to the jury foreman, she says, Your Honor, I didn't put that mark there. I left

it blank, like a lot of the others. Well, Your Honor, what others, and who put the blank there? Who put the mark there? The juror said—the foreman says she didn't. Did a phantom juror mark it, or did the marshals mark it? We'll never know because that's put under the rug.

And then Your Honor also said in her opinion, I'm very disturbed about the jury's inconsistency in Count 17(a), which I was convicted of, and Count 8, because they are identical counts and they're under the same law. So that's why I thought Your Honor might ask them, because if I was found hung jury on Count 8, how could I be found guilty of 17(a)? They're identical counts.

After that Your Honor, you wrote a long opinion, 98-page opinion on her sentencing, and I had a chance to read it and go through it three or four times, and Your Honor said she diligently read all the transcripts. And I know there was a lot of them, and there could have been mistakes made, but I have to say, Your Honor, you misquoted the transcripts a few times. You said Mr. DeLaurentis had a mistrial on 17(b) and Count 9. He wasn't even indicted under them counts. You said Mr. Bellavia got 5,000 a week to put out on the street for interest. That's never in the transcripts. And then you said that Mr. Jahoda said as he left the house I was standing over the body with Mr. Bellavia and Mr. Marino. That's not in the transcripts, Your Honor. I was never placed there. He said that I—according to Mr. Jahoda, he said I drove him back to his car. I don't know if they were misquotes or what.

Your Honor, I just think that we didn't get a fair trial. I think we were fighting three prosecutors here, and you were the fourth one. That's just my feelings. I think

you're pro prosecutor and pro government. And I thank you.

(Applause.)

THE COURT: Comment in any way on anything that anyone says in this courtroom is prohibited. If there is another outburst you will be ejected and removed.

Mr. Leighton.

MR. LEIGHTON: Yes.

Your Honor, what I'm going to say is going to include the right of Louis Marino, the defendant in this case, in the exercise of his right of elocution, and he will tell you that when he has an opportunity.

THE COURT: Certainly.

MR. LEIGHTON: Your Honor, in all the experience I've had in the legal profession that almost totals a half a century, I've never either seen, heard or read about a case like this one, one in which literally hundreds of memorandum have been issued by you. Every facet of this case has been the subject of a memorandum.

And on behalf of Mr. Marino I want the record to show, Your Honor, that we despair of the fact that in every single way that you could find in those memoranda you not only agreed with the government, you even went further than the government lawyers had asked for. The time you spent in one memorandum explaining the position that you have concerning the testimony of Jahoda, an admitted criminal, a man you could see had profited from the very crimes about which he was testifying, but you said in your memorandum that he was totally entitled to be believed because he was credible.

Finally, Your Honor, in the long series of memoranda, two that particularly requires attention are the one you issued on July 22nd, 1993, concerning Mr. Marino and the one you issued on August 17, overruling his request for reconsideration.

As I understand the memorandum of July 22nd—and Your Honor, without seeming immodest, I have never attracted any attention on my ability to read and understand the English language, but as I understand what you said in that memorandum, and I read it, you said that you were finding by a preponderance of the evidence that my client, Louis Marino, committed murder of Hal Smith even though the jury that heard the evidence could not reach a verdict. You also found from by a preponderance of the evidence that Louis Marino had conspired to murder Hal Smith. Your Honor, I respectfully say to you that that cannot be done legally because Louis Marino has a constitutional right, when he's found guilty of a murder or conspiracy to murder, he has a constitutional right to be found guilty beyond a reasonable doubt.

Now, what you now explain in the memorandum of August 17th is that you find his conduct, which is a different thing. Now, Your Honor, the conduct of Louis Marino being at the Rouse house on February 7, 1987, his conduct being in the company of others may well be taken into account by you, and you can find the existence of that conduct by a preponderance of the evidence. But you cannot find that he committed murder, because that requires proof beyond a reasonable doubt. Now, in the memorandum of August 17 I notice there's a shading of meaning indicating to me that Your Honor understands the distinction I'm making.

And then, finally, Your Honor, you say in your both—in both those memoranda, which is true, that Louis Marino cannot be sentenced to life imprisonment. Why? He hasn't committed any crime that requires life imprisonment. The law doesn't impose that obligation—that sentence on him. But you say in the memoranda that you're going to fashion, by consecutive sentences you're going to fashion what is the equivalent of a life sentence. Your Honor, I respectfully say to you that's impossible, because unless you know when Louis Marino is going to die, you can't fashion a series of terms of imprisonment that will be the equivalent of a life sentence. It cannot be done. Life itself precludes that being done.

Therefore, Your Honor, what I conclude and I say on behalf of Louis Marino at this sentencing, if you do what you said in the memorandum of July 22nd, 1993, that you're going to sentence him to consecutive terms so as to impose on him a life sentence, which you have decided he should serve, that's going to be an illegal sentence. There's no law that requires him to be sentenced to life imprisonment.

Now, the guidelines, the guidelines say that conduct can be taken into account to measure the total offense level. But the imposition of a sentence that amounts to a life sentence is contrary to law. And I'm asking you, Your Honor, not to impose a sentence like that. Even the words of Mr. Mars a moment ago, if you listened to him carefully, and I think I did, he's talking about a murder. Mr. Marino hasn't been found guilty of murder by anybody. And, therefore, Your Honor, I ask you to infuse into the sentence—

By the way, Your Honor, I don't think any one of us connected with this case will stand in an open courtroom

like this and say anything that this isn't a serious crime. So when in Mr. Mars' talk about it, of course it's serious to be accused and found guilty of conspiracy to commit racketeering. Sure, the public has to be protected. But isn't the public adequately protected within the recommendation of the probation department? They're the ones who made the complete study of the background, the life of Louis Marino.

And Mr. Mars' statement a moment ago that, sure, Mr. Marino has never been convicted of a crime, however he's not a first offender, now, when did he commit that offense that became the first offense?

I ask you, Your Honor, please, follow the presentence report and its recommendations and impose the sentence accordingly.

Thank you.

THE COURT: Thank you.

Mr. Marino.

DEFENDANT MARINO: No. Mr. Leighton spoke for me.

THE COURT: All right. Mr. Milner.

MR. MILNER: Thank you, Judge. Judge, I also will try to be brief because Mr. Bellavia does have some things that he wishes to say when I'm done speaking.

Judge, I have always found sentencings to be very unhappy and frustrating affairs. They are—they're unhappy for obvious reasons. People are sent off to prison. Lives are ruined. Families are destroyed. There's, in my opinion, a feeling that nobody has really won.

Sentencings are also frustrating because as Bobby Bellavia's defense attorney there is so little that I can say to you that I don't think you've heard many times before, perhaps even today from the other defense attorneys. Nonetheless, there are things that have to be said for Bobby Bellavia and about Bobby Bellavia, not just because he's a defendant about to be sentenced in a criminal case, but because he is a hell of a man, Judge.

He's worked hard his whole life. He's taken care of his family and they love him. He has sacrificed. He has always been gainfully employed despite what the government says, and he has been gainfully employed in legitimate businesses.

At this point in his life what Bobby Bellavia, like most men his age, cares most about is spending time with his grandchildren, playing with his grandchildren, being with his family and his kids. But instead the government, through Mr. Mars, says that rather than do those things Mr. Bellavia should spend the rest of his life in a cage. And for what, Judge? Because he was involved in gambling? Because he was friends with other men who were involved in gambling?

I don't mean to ignore what the charges were. I'm well aware, as everybody in this courtroom is, that Bobby Bellavia was charged with murdering Hal Smith. But the jury said otherwise, Judge. We spent five months in here, untold millions of dollars, and for what? So that the jury could say that Bobby Bellavia did not commit this murder and then Your Honor would say otherwise.

If I thought it would make a difference, Judge, I would have brought in carloads of people, family, friends, acquaintances, people who have known Bobby Bellavia all

his life. And they would have all said the same things about him, because I've spoken with them. They would tell you he was respected, he is well liked, trusted, he's considered a man of his word. He is not what the government says he is, Judge.

Judge, I would submit to you respectfully that the right thing to do in this case would be to accept the jury's finding and not to substitute your verdict for theirs, because that's what's going to happen today. You can sentence Bobby for what he was convicted of. He is ready and willing to accept whatever punishment that might be for those crimes. But don't sentence him for murder, because that's not what the jury found. That's not what happened. That is Mr. Mars' decision. But, Judge, he is no more of a jury than I respectfully submit you should be.

It was Mr. Mars' job to prosecute the case. I believe it is the Court's job to remain neutral and to mediate the case. But it is the jury's job, Judge, and only the jury's job to decide who is guilty and who is not guilty. Our jury spoke. If the government is unhappy with the result that they achieved, then let them retry him. We are all ready and willing to fight gain. Name the time, name the date, and we'll be here. But if we just disregard what the jury has to say, Judge, and what their verdict was, and if we eliminate them from the process, in my opinion, we make a mockery of our judicial system. I don't believe that's what our system is about. I don't believe that's what it was intended to be about.

That's all I have to say. Thank you, Judge.

THE COURT: All right. Mr. Bellavia.

DEFENDANT BELLAVIA: Your Honor. Judge, this is the first chance that I had to really speak to you since you locked me up three and a half years ago. Before you sentence me I think it is important that you know how I feel about everything that has taken place during the last three and a half years.

It has been made clear many times how the prosecutors feel about us and how you feel about us. Now let me tell you how I feel.

Three and a half years ago I was charged with these crimes. I was aware that the charges were coming, and when they did I made no effort to run or hide. I was cooperative and did as I was told. I felt I would get a fair shake in court and that as a result I would have no trouble being acquitted. I was wrong.

The first thing I learned was that even though almost everyone else who is charged with a crime in this country gets bond, I couldn't. Instead, I had to wait over a year and a half just to get a trial while my business went under and my family suffered.

The next thing I learned was that the conversations I was having at the MCC with my attorney and co-defendants were being bugged by the government. When I first got this news, I was naturally upset in knowing that the government knew our trial strategy and everything else. But then I assumed that when you learned of what the government had done you would take the appropriate action, and I felt better. I was wrong again, because you did nothing.

I still had hope when we went to trial it would be conducted fairly. Instead, it was dubious that whatever the government wanted—obvious, I'm sorry, whatever the

government wanted they got. Whatever we asked for was refused.

Despite all of this, I sat through the trial and hardly heard my name mentioned at all for weeks. And sometimes months went by without any testimony or evidence about me. When the jury came back with the verdict, it seemed that they also had not heard much evidence against me, and so they refused to find me guilty of the only serious charge against me, the murder of Hal Smith. This was the good news that I wanted—waited for.

Unfortunately, the worst was yet to come. I have now learned that despite what the Jury decided, you are going to decide and find me guilty of the murder. I don't understand why we bothered to have a five-month trial and waste all the time and money. If you had already made up your mind that you are going to convict us anyway no matter what the jury said, what was the point of the trial?

If you are unhappy that the jury refused to find me guilty of the murder, then let's retry the case. With a new jury I am confident that they won't find me either. But don't become the judge and the jury. I know you have already made up your mind about what sentence to give me, but I still want to say that I feel I am looking forward to starting my appeal, where I feel confident that I will finally receive some justice.

Thank you.

THE COURT: Thank you.

Mr. Mars.

MR. MARS: I have nothing further.

THE COURT: All right. The Court will take a ten-minute recess and I'll return to impose sentence. (Brief recess taken.) (Court resumed in session.)

THE COURT: Having reviewed the extensive presentence reports, the various objections filed in this case, as well as listened to the statements made here today, and ruled on a number of matters that have been objected to, the Court is ready to impose sentences in this case.

The Ferriola street crew, which later became the Infelise street crew, was an organization that existed for a number of purposes, all of them criminal and illegal. And the Court is not going to spend an extensive amount of time outlining those illegal activities because it's well-known. I will just note that these illegal gambling activities included sports bookmaking, parlay cards and casino games, the collection of juice or interest loans made by the crew, the collection of street tax from other criminals engaged in illegal businesses, and the use of these criminal proceeds, the use of the proceeds for these various enterprises to further the financial stability and to produce income for the individuals that were involved.

To conceal these various illegal enterprises that took place over a lengthy and long period of time, various members of the crew engaged in attempts to bribe officials, instructed individuals who were called before the grand jury to lie, encouraged individuals to refuse to testify before the grand jury. And there is no question in this Court's mind that this was an extensive illegal enterprise and no question in this Court's mind that they operated as part of the Chicago Outfit or the Mob.

The amount of income that was generated from these enterprises was significant, and the evidence at this trial supported it.

With respect to the role of the various defendants that are before the Court today, the evidence was overwhelming that Mr. Infelise was the mastermind of this enterprise, that he served in a secondary role when he served as assistant chief to the crew boss for many, many years, approximately 11 years, and then he took over the organization.

The role of Mr. Bellavia as well as Mr. Marino in this enterprise, Mr. Bellavia as a collector and supervisor of the operation, supervising various bookmaking activities, and Mr. Marino, who started out as an agent and a collection supervisor, and ultimately supervised various bookmaking activities.

There was significant testimony regarding these activities which the Court heard, which was corroborated by testimony of a variety of witnesses as well as tape recorded evidence.

The Court turns, then, to the matter that has been more the subject of this litigation than any other, which is the death of Mr. Smith. The Court heard extensive testimony, as did the jury, and having heard the statements that were made here today, one might get the impression that the defendants were not convicted of conspiracy to murder Mr. Smith, but the jury so found with respect to Mr. Infelise and Mr. Bellavia. They found that these individuals beyond a reasonable doubt had conspired to kill Hal Smith. And the testimony that this Court heard from Mr. Jahoda as well as the corroborating testimony, which this Court addressed in great detail in its opinion,

supports this Court's finding that by a preponderance of the evidence and certainly by evidence beyond a reasonable doubt the defendants committed these acts.

The Court spent an inordinate amount of time in this opinion addressing this issue. And one might get the impression that because the jury did not reach a verdict with respect to the substantive counts on this murder that the defendants could not be sentenced with respect to this murder and that somehow the actions of this Court are improper. The law has been well settled for many, many years that the Court can take into account a number of factors with respect to sentencing. The Seventh Circuit as well as the Supreme Court has repeatedly held that courts can look at additional conduct and can indeed look at a situation as this situation to determine if there was sufficient evidence to warrant an upward departure.

This case is not unlike the case that Judge Zagel sentenced in just recently, which was the Masters case, a case in which the defendants were convicted of conspiracy to murder, as in this case, a case in which the jury was asked the specific question whether or not the defendants had committed murder, and the jury did not reach a verdict. The Court explained extensively in this opinion the striking similarity to this case and the Masters case.

The Court should note that Mr. Marino is in a different situation because the jury did not find Mr. Marino guilty of the conspiracy but rather found that they could not reach a verdict.

In that Masters case the Court of Appeals upheld the upward departure that Judge Zagel entered in that case

and stated, "Judges have been considering defendants' activities and character since long before there were guidelines with consistent approval from the highest court. This is one reason why we have held that judges may take other crimes into account when selecting a sentence under the guidelines even if the defendant has been charged with and acquitted of those crimes. An acquittal means that the charge was not proven beyond a reasonable doubt. It does not mean that the defendant didn't do it."

With that precedence in mind, it was the Court's obligation to review the testimony very carefully in this case. It is not this Court's role to quarrel with the law when it is as well settled as it is in this case and has been recently reviewed by the Seventh Circuit. Therefore, the defendants' request today that the Court somehow not impose this life sentence will be rejected. The Court would just like to comment on a couple of other matters before imposing sentence, and that is a couple of procedural matters that were raised during the course of this sentencing.

With respect to the MCC and this incident, the Court, as the defendants well know, in an abundance of caution took extraordinary measures to ensure that the defendants would have ample opportunity to consult with counsel during the course of this trial. The Court has received extensive reports of investigation done by the FBI and supervised by assistants not from this office, but from assistants in the Department of Justice who have no connection with this office, to determine if this alleged bugging was a result of any act of anyone involved in this prosecution team, and stated at the time that if this

Court found any evidence whatsoever to substantiate that, that this Court would take appropriate action.

This Court has reviewed those reports. Those reports are under seal and will be fully available to the Court of Appeals for review. And in this Court's mind and I have determined that there is no evidence to suggest that any member of this prosecution team, nor the FBI or any law enforcement agents were involved in this matter.

With respect to the various jury questions that were raised, the Court has written extensively about that. The Court has maintained all of the various records of conversations, of the transcripts questioning by the jurors in various opinions. Those are under seal and for the Court of Appeals to review.

The Court might note that several of the statements made by the defendant Infelise were incorrect, as the record will reflect.

Having said all that, the Court is ready to impose sentence. The reasons for this sentence the Court has alluded to with respect to the findings that I have made. And, therefore, because this Court has reviewed the evidence extensively and finds that the defendants have committed the crimes as set forth in various opinions that the Court has outlined, the Court will sentence Mr. Rocco Infelise with respect to Counts 1, 2, 6 and 7 to life imprisonment, those sentences to run consecutive; with respect to Counts 12 through 17 and 33 to 42, one year terms on each of those counts, those counts to run concurrent with one another and those sentences to run concurrent with the sentences on Counts 1, 2, 6 and 7.

I will impose a special assessment of 750 dollars and also impose the costs of prosecution with respect to Counts 12 through 17 and 33 through 42.

MR. TUITE: Judge, may I just point out respectfully I do not think you can impose a life sentence on Counts 1, 2, 6 and 7. The statutory maximum is 25, 5 and 5. Even in Masters the Court only imposed 20 and 20 consecutive because that's all the Congress allowed and basically said to try to achieve the life sentence that was the most they could give. But there is no life sentence for the RICO or the gambling, respectfully.

THE COURT: Well, the Court has ruled that an upward departure is warranted, and I am—

MR. TUITE: I understand that.

THE COURT: —upwardly departing.

MR. TUITE: I understand, but you can only depart up to the maximum on the sentence imposed by Congress. And the maximum is 20 years on Count 1 and five on Counts 2, 6 and 7.

I don't think the government—

MR. MARS: I think, Your Honor, what ultimately happens and one thing that I wanted to point out was in case there's a question on the record, with respect to some of the counts I think the words "concurrent" were used, and I think under the Masters decision what in effect happens is the Court is required to add the maximum penalties, the number of the maximum penalty for each of those counts and impose them consecutively.

So it's my belief that what would be required is to, for example, take the maximum penalty for Count 1, which is the 20 years, impose that sentence, take the maximum

penalty for the next count and add it to that 20 years, ultimately reaching with respect to Mr. Infelise's case, Your Honor, I believe, a total of, by my addition, 63 years imprisonment if each of those counts, 1, 2, 6 and 7, 12 through 17 and 33 to 42, are, as I believe the Masters decision requires, are imposed consecutively to each other.

THE COURT: All right. So with respect to Count 1, that would be 20 years.

MR. MARS: That's correct, Judge.

It might be helpful—I know the Court probably has the figures, but I did just a brief chart. If the Court cares, I can give you the maximums for each of the counts.

THE COURT: All right.

MR. TUITE: Judge, I would point out I don't know what his chart shows, but Counts 12, 13, 14, 15, Counts 33, 35—33, 34, 35, 36, 37 and 38 are all pre-guideline activity, which would then not necessarily fall within that to vindicate the guidelines.

THE COURT: Well, I didn't intend, Mr. Tuite, to sentence to anything beyond that on those counts.

MR. TUITE: Okay.

THE COURT: That was not my intention to impose any other term.

MR. MARS: The maximum penalties for each of the counts, then, Judge, would be Count 1 is 20 years, Counts 2, 6 and 7 are each five years, Counts 12 through 17 are each three years, and Counts 33 to 42 are each one year.

THE COURT: If you could provide that chart to me, Mr. Mars.

MR. MARS: I sure will, Judge.

I can give the same—the same numbers for the other two defendants if the Court wishes.

THE COURT: That's fine.

MR. MARS: With respect to Marino, counts—again, Count 1 is 20 years, Count 2 is five years, and Count 18 is three years.

And with respect to Bellavia, Count 1 is 20 years, Count 2 is five years, and Count 6 is five years.

And, obviously, it is the government's position that whether they are pre- or post-guidelines sentences, the guidelines require a consecutive imposition of sentence on each count.

THE COURT: All right. If you'll tender that, Mr. Mars.

MR. MARS: These are in my handwriting, Judge, if that's okay,

THE COURT: All right.

(Documents tendered to the Court.)

THE COURT: All right. So with respect to Mr. Infelise, the sentence on Count 1 is 20 years; on Count 2, five years; on Count 6, five years; Count 7, five years; Counts 12 through 17, three years each; Count 33 through 42, one year each, all those sentences to run consecutive; and the Court has upwardly departed for a life term with respect to Counts 1 through 7, as I indicated earlier.

With respect to Mr. Bellavia, the Court's sentence is on Count 2, 20 years; Count 2, five years; Count 6, five years, making it a 30-year total. The Court upwardly de-

parts to impose a life sentence. The special assessment is 150 dollars.

With respect to Mr. Marino, the Court sentences Count 1, 20 years; Count 2, five years; Count 18, three years, for a total of 28 years. The Court upwardly departs in this instance to impose a sentence of life imprisonment, and also a special assessment of 150 dollars.

With respect to each defendant, the Court waives the costs of incarceration, waives a fine and waives restitution.

MR. TUITE: Judge, again, respectfully, you cannot depart over the statutory maximum. You've given these years. You can't depart then up to life. What Masters says, you give as much as you can to reach that level. The most you can give is what you've given and you cannot, respectfully, depart above that.

THE COURT: Well, no. The upward departure allows for the Court to depart up to life, but I have to give the maximum term on each of those counts.

MR. TUITE: Right, but you can't—you're saying is that you've given them the maximum term and then departing upward to life. You can depart up to the maximum. That's all you can do is depart up to the maximum.

MR. MARS: From what I understand the Court is saying, one of the grounds for reaching the level 43 is via an upward departure.

THE COURT: Right.

MR. MARS: And that upward departure, if we get to a level 43 under the guidelines, mandates a life sentence. But obviously under Masters, the most the Court can do to effectuate that guidelines sentence is to impose the

sentences consecutively on the counts the Court has, which is, I think, what the Court did.

MR. TUITE: I thought the Court said you gave the maximum and then departing up to life. I think what it is, is you've departed to find a life sentence, and then you've tried to accomplish that by giving the maximum sentence.

THE COURT: Right. You can't accomplish the whole thing by the maximum sentence.

MR. TUITE: Right.

THE COURT: So it's the departure, the level 43 departure that enables the Court to impose the life sentence.

MR. TUITE: But you can only impose the 63 years that is in the statute. It makes a lot of difference when they get to an institution whether it says life or 63 years. And I submit you can't give life because the statute doesn't provide for life. The maximum on these sentences provides for 63 years.

MR. MARS: If that's the, I don't mean to demean the word, "technicality" that Mr. Tuite is referring to, that may be in itself true. The Court's guidelines sentence is life, but the statutory maximum is only up to, in Mr. Infelise's case, 63 years. So I believe that the most the Court can numerically impose is the maximum on each of the counts consecutively imposed.

THE COURT: Well, just so the record is clear, the Court is imposing the maximum sentence on each count, as I stated.

MR. TUITE: I understand that, Judge.

THE COURT: And with respect to the guidelines sentence and the Court's upward departure, because of the calculation of a 43, the Court imposes a life sentence with respect to the guideline calculation.

MR. TUITE: Judge, you can't impose a life sentence because Congress did not allow for a life sentence for RICO and gambling. What they've allowed you to do is depart as high as you can. That's what you did, the 63 years. But if they go down with a judgment order that says life, it isn't. It's a 63—for Mr. Infelise it's not going to make him a whole lot of different because of his age and his health. But I submit that the judgment and commitment order can only say 63 years.

MR. MILNER: Judge, on behalf of Mr. Bellavia, my point is if his guidelines come out to eight years but the statutory maximum for the three crimes combined is 30, then you can depart from eight all the way up to 30 if you see fit, but you can't go beyond 30 because Congress doesn't allow for a higher penalty than 30 years. That's the maximum. Your guidelines are irrelevant once you reach the statutory maximum.

MR. MARS: I think for purposes of the J&C, Judge—and I think what the Court has said is that under the guideline computations this would be a life sentence. But as far as what numbers appear on the J&C, I think that all that can be done is matching the counts to the maximum penalties and imposing the final numerical guideline or—excuse me—statutory maximum for all the counts combined. So from what I understood the Court to say, in Infelise's case that would be 63 years, in Bellavia's case it would be 30, and in Marino's it would be 28.

Even though the guidelines call for a higher sentence in the sense that it calls for life imprisonment, what has to be recorded on the J&C, I believe, is the statutory maximums for each of those counts imposed consecutively.

THE COURT: Well, the J&C will reflect those statutory maximums, but as I've indicated, having done the calculation, that calculates out to a life imprisonment sentence for the defendants.

And in terms of the J&C, we will have the counts to the maximum as the Court has found this morning. So that's what will be reflected in the order, in the judgment and the commitment order.

MR. TUITE: Thank you. And I think if Miss Love would also note that 12, 13, 14 and 15 are pre-guidelines, because it affects release, and 34, 35, 36, 37, 38, 33 through 38 inclusive are also preguidelines.

And we would at this time as well, Judge, with respect to Mr. Infelise on the hung jury counts of 8, 9, 17(a) demand trial.

THE COURT REPORTER: 17(a) what?

MR. TUITE: 17(a) RICO—Racketeering Act 17(a) in Count 1, Counts 8 and 9 in which the jury failed to reach a verdict, we demand trial on those counts.

MR. MILNER: Mr. Bellavia does likewise for the counts on which the jury found as well, Judge.

MR. LEIGHTON: And so does Mr. Marino.

And on behalf of Mr. Marino I'll repeat what I said earlier. He objects to this sentence on the ground that as I understand the comments of the Court, it's for the purpose of imposing on him a life sentence when this Court

does not have the authority to impose a life sentence in this case. So I want the record to be clear about that objection.

THE COURT: All right. That objection is noted.

The order, as I indicated, will show—will reflect the defendants are sentenced to the maximum sentence under each of the counts. And that's the order that will reflect. With respect to this request for immediate trial, what's the government's position?

MR. MARS: Your Honor, given to understand that the Court wished to hear from the government on those counts at the conclusion of the DeLaurentis sentencing, and we will advise the Court of our position with respect to those two counts.

THE COURT: All right.

And with respect to the appeal, the defendants are all aware and I am assuming will appeal. And that notice of appeal, I don't know where the status of that is, Mr. Tuite, but you have ten days from the date of the sentencing to file a notice of appeal.

MR. TUITE: Right. We will, Judge.

MR. LEIGHTON: Mr. Marino has been advised of his right of appeal, and a notice of appeal will be filed.

THE COURT: Mr. Milner.

MR. MILNER: I'll file it on behalf of Mr. Bellavia.

THE COURT: All right.

MR. LEIGHTON: When will we have the judgment order, Your Honor?

THE COURT: Sometime next week.

MR. TUITE: One other matter with Mr. Infelise. Because of his heart condition, he's on medication. We'd ask that there be a recommendation for Rochester, to the medical facility in Rochester.

THE COURT: Any objection?

MR. MARS: I have no objection, Your Honor. If he needs medical attention, I'm sure they'll be able to determine which—

MR. LEIGHTON: On behalf of—

MR. MARS: Excuse me, Mr. Leighton. Just with respect to the sentence, so the record is clear, with respect to the special assessment only, Judge, on Mr. Infelise I'm not sure, I lost track with my own notes, whether the Court imposed the special assessment for the 20 counts of his conviction. I know that the Court did so—

THE COURT: I did. 750 dollars.

MR. TUITE: Yes, 750.

MR. MILNER: Judge, on behalf of Mr. Bellavia, we would request that you recommend that he be incarcerated at the Oxford facility in Oxford, Wisconsin. Judge, the reasons are obvious: family, wife, children, grandchildren are all in this area. Oxford, I believe, is the closest prison. You've sentenced him to a lengthy term. There's no reason to make it harder on the family than necessary.

MR. MARS: The objection I have with that particular institution, Your Honor, and I know if the Court chooses to do this it's only recommendation, but it's been very frequent for the crew members in this case to all seem to recommend Oxford. And I know that there are at least three defendants from this case already housed there.

And so I only mention this because I know the Bureau of Prisons does the very best it can to accommodate any court's recommendation, and I'm not sure that it would be useful to burden the Bureau of Prisons with a court's recommendation for that particular institution since it's very likely that defendants in this courtroom will need to be separated from other defendants in this case.

MR. MILNER: Judge, in response, the only thing I would say about that is that I'm sure the people that Mr. Mars refers to as crew members, their lawyers have asked for Oxford, but we ask for Oxford for almost all defendants in this area for the obvious reason: because it's close to home. Oxford is a large prison. If there are three other people there that Mr. Mars says are alleged organized crime members, I'm sure that they won't all be in the same cell together. And considering the length of sentences that have been imposed, I don't think it's likely that any trouble will be resulting. So, again, we'd ask that Oxford be the facility recommended.

THE COURT: Mr. Leighton, do you have any recommendation?

MR. LEIGHTON: On behalf of Mr. Marino, Your Honor, I join in Mr. Tuite's request for Mr. Infelise because only a few days ago Mr. Marino was informed at the MCC that his test for tuberculosis was shown to be a positive reaction.

Now, I've talked with the doctor about this, Dr. Betz, and he tells me that a test of this kind will show a positive reaction, which would indicate that the person has an infection for some time. Now, Mr. Marino was given an examination when he first went to the MCC in March 1992, and it was negative, so that the positive reaction

now is something that occurred between March 1992 and now. At the present moment it is shown to be a positive reaction. And I ask that he be sent to the medical facility and the correctional center in Rochester, where he can be adequately treated, and thereafter he can be assigned to whatever institution is necessary.

MR. MARS: The second part of the story, Your Honor, is that Mr. Marino has been given a chest X-ray. I talked to Dr. Alston yesterday after Mr. Leighton brought this to my attention. The X-ray is negative, and Dr. Alston has indicated that the only treatment that can be done, since he has shown no signs of pulmonary disorder from the X-ray, is to give him a yearly X-ray.

It may well be that the Bureau of Prisons has procedures for medically examining all inmates prior to making a final recommendation as to where they should go, and I guess I would suggest that Mr. Marino be preliminarily examined or reexamined again at Rochester, but I don't know that I would agree that the Court should recommend that that be his final institution for him to serve his sentence.

THE COURT: No, I don't think Mr. Leighton was suggesting that.

MR. MARS: I'm sorry.

THE COURT: But I'll recommend the designation of Rochester for the purposes of a medical examination, and then the Bureau of Prisons can make that determination.

MR. LEIGHTON: Sure.

And by the way, you will be solving a problem that I have. I was trying to get the MCC to make Mr. Marino's medical records available so that Dr. Betz could examine

them, but I understand that's almost impossible at the moment. It will take a legal proceeding to get it. This way it will solve the matter totally. He can go to Rochester, be examined. Then they could find out the extent of the infection, and they could handle him in due course within the Bureau of Prisons.

Thank you very much.

THE COURT: All right. And relative—just one other thing, Mr. Leighton, just so the record is clear. I think I've made it clear. The J&C will reflect the sentences that the Court ultimately imposed, which was the 30 years for Mr. Bellavia, 63 years for Mr. Infelise and the 28 years, for Mr. Marino. Just so that's clear, because you raised that again.

MR. LEIGHTON: All right. Thank you.

THE COURT: Anything else?

MR. MARS: No, Your Honor.

THE COURT: All right.

* * * * * * * * * * * *

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

_____ _____

Official Court Reporter Date

Supreme Court, U.S.
FILED
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No. 96-294

In the Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

1. Whether a sentencing court may consider conduct underlying a charge on which the jury was unable to reach a verdict.

2. Whether the Fifth or Sixth Amendment requires clear and convincing evidence to support a sentencing court's factual determinations underlying an upward adjustment in the defendant's Sentencing Guidelines sentencing range or an upward departure from that range.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Green v. *United States*, 355 U.S. 184 (1957)	7
McMillan v. *Pennsylvania*, 447 U.S. 79 (1986)	9, 11
Nicholas v. *United States*, 114 S. Ct. 1921 (1994)	8
Richardson v. *United States*, 468 U.S. 317 (1984)	7
United States v. *Alston*, 895 F.2d 1362 (11th Cir. 1990)	10
United States v. *Badaracco*, 954 F.2d 928 (3d Cir. 1992)	12
United States v. *Billingsley*, 978 F.2d 861 (5th Cir. 1992), cert. denied, 507 U.S. 1010 (1993)	11
United States v. *Black*, 78 F.3d 1 (1st Cir. 1996), cert. denied, No. 96-5500 (Oct. 7, 1996)	14
United States v. *Blanco*, 888 F.2d 907 (1st Cir. 1989)	9-10
United States v. *Carreon*, 11 F.3d 1225 (5th Cir. 1994)	11
United States v. *Carroll*, 893 F.2d 1502 (6th Cir. 1990)	10
United States v. *Casto*, 889 F.2d 562 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990)	10
United States v. *Clark*, 84 F.3d 506 (1st Cir. 1996), cert. denied, No. 96-5776 (Oct. 7, 1996)	14
United States v. *Dix*, 77 F.3d 496 (11th Cir.), cert. denied, No. 95-8856 (Oct. 7, 1996)	14

Cases—Continued: Page

United States v. *Dunnigan*, 507 U.S. 87 (1993) 8
United States v. *Duran*, 15 F.3d 131 (9th Cir. Cir. 1994) 8
United States v. *Frederick*, 897 F.2d 490 (10th Cir.), cert. denied, 498 U.S. 863 (1990) 10
United States v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, 503 U.S. 952 (1992) 10, 12
United States v. *Grayson*, 438 U.S. 41 (1978) 8
United States v. *Guerra*, 888 F.2d 247 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990) 10
United States v. *Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993) 11
United States v. *Ignancio Munio*, 909 F.2d 436 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991) 10
United States v. *Joetzki*, 952 F.2d 1090 (9th Cir. 1991) 10, 11
United States v. *Kikumura*, 918 F.2d 1084 (3d Cir. 1990) 10, 11
United States v. *Lam Kwong-Wah*, 966 F.2d 682 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992) 9
United States v. *Lindia*, 82 F.3d 1154 (1st Cir. 1996) 14
United States v. *Lombard*, 72 F.3d 170 (1st Cir. 1995) 12, 13
United States v. *Masters*, 978 F.2d 281 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993) 10
United States v. *Mergerson*, 4 F.3d 337 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994) 11
United States v. *Miele*, 989 F.2d 659 (3d Cir. 1993) 11
United States v. *Payne*, 940 F.2d 286 (8th Cir.), cert. denied, 502 U.S. 944 (1991) 10
United States v. *Pinkey*, 15 F.3d 825 (9th Cir. 1994) 7

Cases—Continued: Page

United States v. *Pointer*, 998 F.2d 1011 (4th Cir. 1993), cert. denied, 510 U.S. 1042 (1994) 14
United States v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 503 U.S. 961 (1992) 11
United States v. *Reyes*, 930 F.2d 310 (3d Cir. 1991) 12
United States v. *St. Julian*, 922 F.2d 563 (10th Cir. 1990) 11
United States v. *Townley*, 929 F.2d 365 (8th Cir. 1991) 11
United States v. *Urrego-Linares*, 879 F.2d 1234 (4th Cir.), cert. denied, 493 U.S. 943 (1989) 10
United States v. *White*, 888 F.2d 490 (7th Cir. 1989) 10
Witte v. *United States*, 115 S. Ct. 2199 (1995) 8

Statutes and regulations:

18 U.S.C. 371 2
18 U.S.C. 1962(d) 2
26 U.S.C. 7206 2
Sentencing Guidelines:
§ 1B1.1 4
§ 1B1.3 ..... 4, 12
§ 2A1.1 5
§ 2A1.5 4
§ 2E1.1 ..... 3, 12
§ 3C1.1 3
§ 3D1.4 ..... 3, 5, 14
§ 5K2.8 4

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-294

LOUIS MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 78 F.3d 294. The opinion of the district court (Pet. App. C1-C99) is reported at 835 F. Supp. 1501.

JURISDICTION

The judgment of the court of appeals (Pet. App. A18) was entered on March 1, 1996. A petition for rehearing was denied on May 23, 1996. Pet. App. B1. The petition for a writ of certiorari was filed on August 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); one count of conspiracy to conduct an illegal gambling enterprise, in violation of 18 U.S.C. 371; and one count of submitting a false and fraudulent tax return, in violation of 26 U.S.C. 7206. Petitioner was sentenced to a total of 28 years' imprisonment. The court of appeals affirmed. Pet. App. A1-A17.

1. Petitioner and his co-defendants were members of the Ferriola Street Crew, an operating unit of an organized crime operation known as the "Chicago Outfit." There was "overwhelming" evidence that, in furtherance of organized crime operations, the Ferriola Street Crew ran illegal gambling businesses, engaged in loan sharking, bribed public officials, suborned jurors, and collected protection payments ("street tax") from brothels, gambling enterprises, and other illegal businesses. Pet. App. A2, C5. The government also presented evidence at trial that several members of the Ferriola Street Crew, including petitioner, took part in the murder of Hal Smith, a bookmaker who had refused to pay the "street tax" demanded by the Crew. *Id.* at A2.

Petitioner was convicted on one count of racketeering conspiracy, one count of gambling conspiracy, and one count of filing a false tax return. The jury was unable to reach a verdict on two counts that charged petitioner with conspiring to murder and murdering Hal Smith. On the racketeering conspiracy count, the jury also was unable to reach a verdict as to two predicate racketeering acts charging petitioner with

conspiring to murder and murdering Smith.[1] Pet. App. C1 & n.3.

2. The Probation Office prepared a Presentence Report (PSR) that assigned petitioner a total adjusted offense level of 28 under the Sentencing Guidelines.[2] Pet. App. C32. The government and petitioner filed objections to the PSR, which the district court addressed in a comprehensive opinion issued before sentencing. *Id.* at C1-C99. The district court found that petitioner's total adjusted offense level was 43, *id.* at C98, and sentenced him to 28 years' imprisonment, *id.* at D39.

a. The district court first concluded that petitioner should receive a one-point enhancement (to 29) for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1. Pet. App. C32-C46. The government argued that the enhancement was warranted because petitioner participated in the murder of Hal Smith, whom the Crew believed was a government informant. *Id.* at C32. The district court found that the government had established by a preponderance of

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[1] The jury found that petitioner had committed nine other predicate racketeering acts, including collecting unlawful debts, extortion, and running illegal sports gambling and parlay card bookmaking operations. Pet. App. C1 & n.2.

[2] The PSR calculated the adjusted offense level at 28 as follows. First, pursuant to Sentencing Guidelines § 2E1.1, the PSR calculated offense levels for all of the nine predicate racketeering acts of which petitioner was found guilty in connection with the RICO conspiracy charge, and assigned petitioner the offense level applicable to the greatest of those offense levels, which was 23. PSR at 4-13. Next, the PSR calculated a combined offense level for the counts, pursuant to Guidelines § 3D1.4. That calculation resulted in the addition of five levels—the maximum provided for in Guidelines § 3D1.4—for a final offense level of 28. PSR at 13-14.

the evidence that petitioner participated in Smith's murder, but it also found the evidence insufficient to support a conclusion that the murder was committed to obstruct the government's investigation of the Crew. *Id.* at C38-C39. Instead, the court based the Section 3C1.1 enhancement on petitioner's payment of "hush money" to a Crew member and on petitioner's involvement in obtaining police protection for a prostitution business. *Id.* at C39-C46.

b. The district court then determined that petitioner's offense level should be raised further to 43, for three independent reasons. First, the court concluded that petitioner's involvement in Smith's murder was "relevant conduct," within the meaning of Guidelines §§ 1B1.1 and 1B1.3, which (taken together) required the court to sentence petitioner based on "the offense of conviction and all relevant conduct," including all acts that were committed "during the commission of the offense of conviction, in preparation for that offense * * * or * * * in furtherance of that offense." See Pet. App. C50 (emphasis omitted); Guidelines § 1B1.1, Application Note 1(1); Guidelines § 1B1.3. The court found specifically that the government had proven, by a preponderance of the evidence, that "Marino was part of the conspiracy to murder Hal Smith and Smith's murder was part of the plan of the RICO conspiracy of which [petitioner] was found guilty." Pet. App. C52. The court also noted that petitioner had acknowledged that the preponderance of the evidence is "the standard of proof governing upward departures." *Id.* at C50 n.28. Accordingly, the court increased petitioner's offense level to 43, because that is the offense level supplied by Guidelines § 2A1.5, the Guideline

applicable to conspiracy to commit murder.[3] Pet. App. C59-C60.

Second, the court determined that an upward departure from petitioner's Guidelines sentencing range was warranted because "the guidelines applicable to [petitioner]'s participation in the charged RICO conspiracy d[id] not adequately account for his involvement in Smith's murder." Pet. App. C52. The court found that a departure up to level 43 was appropriate "because the circumstances surrounding Smith's death demonstrate that this offense is comparable to first degree murder." *Ibid.* The court also noted that an upward departure was supported by Guidelines § 5K2.8, addressing conduct that is "unusually heinous, cruel, brutal, or degrading to the victim," because the evidence showed that Smith had been brutally tortured. Pet. App. C53-C54 n.29.

Third, the court concluded that an upward departure from the Guidelines sentencing range was independently warranted on the basis of Guidelines § 3D1.4, which permits such a departure when the adjustment required by that Guideline for combined offenses yields a sentencing range that is clearly inadequate. Pet. App. C58 n.33. The court found that petitioner had committed such a large number of underlying offenses that the greatest adjustment possible under Guidelines § 3D1.4 did not produce an adequate upward adjustment. *Ibid.*

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[3] Guidelines § 2A1.5 supplies a base offense level of 28 for the offense of conspiracy to commit murder. Section 2A1.5 directs the court to apply the first-degree murder provision, Guidelines § 2A1.1, if the conspiracy resulted in the death of the victim. In turn, Guidelines § 2A1.1 supplies a base offense level of 43.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. A1-A17. The court rejected petitioner's contention that the district court had "usurped the jury's function" by sentencing petitioner based on a finding that petitioner was involved in Smith's murder, notwithstanding the jury's inability to reach a verdict on the murder charges in the indictment. *Id.* at A14. The court noted that the jury was asked to decide whether petitioner was guilty beyond a reasonable doubt, whereas at sentencing, the government was required to prove petitioner's participation in the murder only by a preponderance of the evidence. Thus, the court concluded, "the failure of the proof to satisfy the first standard doesn't show that it fails to satisfy the second." *Ibid.*[4]

ARGUMENT

1. Petitioner contends that the district court's consideration, at sentencing, of his participation in Smith's murder deprived him of his right to have his guilt determined by a jury beyond a reasonable doubt. See Pet. 5-14. He argues that the jury "effectively acquitted" him of any responsibility for Smith's murder, Pet. 5 (emphasis omitted), and that the court was therefore forbidden to take that "acquitted conduct" (*ibid.*) into account when determining his sentence. Petitioner's contention does not warrant further review.

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[4] The court of appeals acknowledged that two members of the Seventh Circuit had expressed "tentative support for requiring" proof by clear and convincing evidence of facts presented at sentencing "in justification of a markedly higher sentence." Pet. App. A15. It noted, however, that that was "neither the present view of a majority of the judges nor a position urged by the defendants in this case." *Ibid.*

Petitioner's claim fails at the threshold, because he was not acquitted of any charge. The jury at petitioner's trial was unable to reach a verdict on the counts charging him with murdering, and conspiring to murder, Hal Smith. A hung jury, however, is not equivalent to an acquittal, and the government would have been permitted to retry petitioner on the charges relating to Smith's murder. See *Richardson* v. *United States*, 468 U.S. 317, 325 (1984).

Petitioner's reliance (Pet. 5 n.3) on *Green* v. *United States*, 355 U.S. 184, 190 (1957), is unavailing. In that case, the jury was authorized to find the defendant guilty of either first-degree or second-degree murder, in the alternative, and it found him guilty of second-degree murder. Under those circumstances, the Court concluded that the defendant was "implicit[ly] acquitt[ed]" of the greater charge because the jury returned a guilty verdict on the lesser-included offense. *Ibid.* Because the jury did not convict petitioner on a lesser-included charge, the jury's inability to reach a verdict on the murder and murder conspiracy counts was not an implicit acquittal on those charges.

Because petitioner was not acquitted of murder or conspiracy to murder, there is no reason to hold the petition in this case for *United States* v. *Watts*, petition for cert. pending, No. 95-1906. The petition in *Watts* presents the question whether a court, in imposing sentence for the offense of conviction, may consider conduct underlying a charge of which the defendant was acquitted. The circuits are divided on that question, with the Ninth Circuit standing alone in the view that "acquitted conduct" may not be considered in sentencing a defendant for an offense of which he was convicted. See *United States* v.

Pinkney, 15 F.3d 825 (9th Cir. 1994); 95-1906 Pet. at 8-9 & n.2 (citing cases). Even the Ninth Circuit has held, however, that conduct underlying a charge as to which a jury failed to reach a verdict may be considered, when relevant, in sentencing a defendant for the offense of conviction. See *United States* v. *Duran*, 15 F.3d 131, 133 (9th Cir. 1994) (per curiam) (notwithstanding Ninth Circuit's bar on use of acquitted conduct at sentencing, "the district court is * * * free to consider facts relating to" a charge as to which jury failed to reach a verdict). Because petitioner's sentence was not based on any conduct underlying a charge on which he was acquitted, the disposition of *Watts* will not affect this case.

In any event, petitioner's argument is without merit, for it rests on the erroneous premise that his sentence was a punishment for a crime of which he was not convicted. This Court has consistently held that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte* v. *United States*, 115 S. Ct. 2199, 2207 (1995); see also *id.* at 2207-2208 ("the offender is * * * punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense"); *Nichols* v. *United States*, 114 S. Ct. 1921, 1927 (1994) ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction;" they "penal[ize] only the last offense committed by the defendant"). Thus, the Court has held that a court may constitutionally

consider the defendant's perjury at trial in sentencing him for the offense of conviction, see *United States* v. *Dunnigan*, 507 U.S. 87 (1993); *United States* v. *Grayson*, 438 U.S. 41 (1978), and has rejected the contention that such a practice amounts to "punishment for the crime of perjury for which he has not been indicted, tried, or convicted by due process," *id.* at 52. The same conclusion applies here: the district court was permitted to consider petitioner's relevant conduct, including his role in the murder of Smith that was part of the racketeering conspiracy, when sentencing him for participating in that conspiracy, even though the jury had not found him guilty of murder.

2. a. Petitioner also contends (Pet. 14-24) that, even if the sentencing court was permitted to consider his participation in the conspiracy to murder Smith, it was required by due process principles to use a more stringent standard than the preponderance of the evidence when determining that he was involved in that conspiracy and murder. That argument is foreclosed by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, the Court "ha[d] little difficulty concluding that * * * the preponderance [of the evidence] standard satisfies due process" as applied to sentencing proceedings. *Id.* at 91. The Court noted there that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment," and that it had "consistently approved sentencing schemes that mandate consideration of facts related to the crime, without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92. In accordance with *McMillan*, every court of appeals that has considered the issue has held that the preponderance of the evidence

standard is generally sufficient for making factual findings underlying sentencing determinations.[5] The court of appeals in this case correctly reached the same conclusion. Pet. App. A14-A15.

As petitioner points out (Pet. 19), the Third Circuit in *United States* v. *Kikumura*, 918 F.2d 1084 (1990), departed from the rule that sentencing findings may always be based on a preponderance of the evidence. In *Kikumura*, the sentencing court departed upward from the Guidelines sentencing range of 27-33 months' imprisonment, and imposed a sentence of 30 years' imprisonment. That twelve-fold increase was based on the court's finding that the defendant's offense of conviction was part of a larger, uncharged scheme to commit terrorist acts. *Id.* at 1098-1102.

In *Kikumura*, the Third Circuit held that, in light of the exceptional magnitude of the departure, the

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[5] See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992); *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *Frierson*, 945 F.2d 650, 652 (3d Cir. 1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Payne*, 940 F.2d 286, 292 (8th Cir.), cert. denied, 502 U.S. 944 (1991); *United States* v. *Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 498 U.S. 863 (1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990).

facts underlying the departure had to be proved by clear and convincing evidence. That heightened standard was necessary, in the court of appeals' view, in a case where "the magnitude of a proposed departure dwarfs the guideline range applicable to the substantive offense of conviction," 918 F.2d at 1089, to prevent the departure from becoming the "tail which wags the dog of the substantive offense," *id.* at 1101 (quoting *McMillan*, 477 U.S. at 88). The court stressed that the heightened standard of proof was necessary because of the "extreme situation[]" in that case (918 F.2d at 1100), involving "the largest departure from an applicable guideline range * * * since the sentencing guidelines became effective" (*id.* at 1089).

Kikumura has not been followed by any other circuit,[6] and the Third Circuit itself subsequently made clear that *Kikumura* applies only in extraordinary situations. See, *e.g.*, *United States* v. *Miele*,

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[6] The Fifth, Eighth, and Ninth Circuits have reserved the question whether they would follow *Kikumura* in an exceptional case. See *United States* v. *Mergerson*, 4 F.3d 337, 343-345 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994); *United States* v. *Billingsley*, 978 F.2d 861, 865-866 (5th Cir. 1992), cert. denied, 507 U.S. 1010 (1993); *United States* v. *Restrepo*, 946 F.2d 654, 661 n.12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961 (1992); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1523-1524 (9th Cir. 1992), cert. denied, 508 U.S. 929 (1993); *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991). The courts in *Mergerson*, *Restrepo*, and *Townley* applied the preponderance standard, as have successor panels. See, *e.g.*, *United States* v. *Carreon*, 11 F.3d 1225, 1240 (5th Cir. 1994); *United States* v. *Joetzki*, 952 F.2d at 1096; *United States* v. *Payne*, 940 F.2d at 292. The Tenth Circuit has referred favorably to *Kikumura* in dictum in a case in which the issue was not presented. See *United States* v. *St. Julian*, 922 F.2d 563, 568 n.1 (1990).

989 F.2d 659, 663 n.3 (1993). Specifically, since *Kikumura*, the Third Circuit has held that sentencing courts should use the preponderance of the evidence standard in determining the applicability of specific offense characteristics and adjustments under the Guidelines. See *United States* v. *Badaracco*, 954 F.2d 928, 935 (1992); *United States* v. *Frierson*, 945 F.2d 650, 652 (1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Reyes*, 930 F.2d 310, 315 (1991).

This case does not present the "extreme situation" present in *Kikumura*. Under petitioner's calculation (see Pet. 4), his Guidelines sentencing range should be 87-108 months' imprisonment (the range corresponding to offense level 29 and Criminal History Category I). The 28-year sentence imposed by the district court thus represents just over a three-fold increase over the sentence that petitioner concedes to be appropriate. That increase is of an entirely different order of magnitude than the twelve-fold increase at issue in *Kikumura*. Furthermore, although the district court found in this case (as in *Kikumura*) that an upward departure from the Guidelines sentencing range was warranted, it also based petitioner's sentence independently on an adjustment to that sentencing range, as required by Guidelines § 1B1.3 and Guidelines § 2E1.1. That factor was not present in *Kikumura*, and it is not clear that the Third Circuit would require clear and convincing evidence in a case not involving an upward departure from a Guidelines sentencing range.

In arguing that a preponderance of the evidence standard violates due process, petitioner also relies (Pet. 17-19) on *United States* v. *Lombard*, 72 F.3d 170 (1st Cir. 1995), but that case does not assist him. In *Lombard*, the defendant had been acquitted of state

murder charges, but was subsequently convicted on federal firearms charges. 72 F.3d at 172. At sentencing, the district court found that the defendant had used a firearm to commit the very murders of which he had been acquitted in state court. The resulting Guidelines sentence was a mandatory term of life imprisonment instead of 262-327 months' imprisonment. *Id.* at 174-175 & n.6. On those facts, after characterizing the case as one in which "the tail has wagged the dog," *id.* at 177, the court of appeals held that the district court had authority to depart downward. *Id.* at 184. In reaching that conclusion, the *Lombard* court relied on the unique combination of factors involved in that case, including the state court acquittal, the magnitude of the enhancement, the seriousness of the enhancing conduct compared to the offense of conviction, and the mandatory life sentence. *Id.* at 180-186. The court emphasized that "this is an extreme case," and that "no comparable concerns would be raised by cases involving even sizable sentence increases based on uncharged [conduct]." *Id.* at 186.

The present case is notably different from *Lombard*. Petitioner was not sentenced based on any conduct of which he had been acquitted. Nor was he sentenced to life imprisonment (as he could have been upon conviction of murder or conspiracy to commit murder), and so the murder was not "treated as the gravamen of the offense," as had been the case in *Lombard*. See 72 F.3d at 178.

In any event, *Lombard* addressed a court's authority to depart from the Guidelines range; it did not address the standard of proof issue raised by petitioner. Indeed, *Lombard* observed that a sentencing court finds facts under the preponderance of the

evidence standard, and that a defendant has no due process right to sentencing under a higher standard of proof. 72 F.3d at 175-176. The First Circuit continues to adhere to the preponderance standard for sentencing determinations, and has cited *Lombard* as authority for that adherence. See *United States* v. *Clark*, 84 F.3d 506, 509 (1st Cir. 1996), cert. denied, No. 96-5776 (Oct. 7, 1996); *United States* v. *Lindia*, 82 F.3d 1154, 1161 (1st Cir. 1996); *United States* v. *Black*, 78 F.3d 1, 4 (1st Cir. 1996), cert. denied, No. 96-5500 (Oct. 7, 1996). Accordingly, *Lombard* is inapposite here.

b. This Court has on several occasions denied review of the issue presented by petitioner. See *United States* v. *Dix*, 77 F.3d 496 (11th Cir.) (Table), cert. denied, No. 95-8856 (Oct. 7, 1996); *United States* v. *Pointer*, 998 F.2d 1011 (4th Cir. 1993) (Table), cert. denied, 510 U.S. 1042 (1994). There is no reason for a different result in this case. In any event, this case would be an inappropriate vehicle for deciding whether the Constitution ever requires that facts relevant to sentencing be found by a standard of proof higher than a preponderance of the evidence. Not only did petitioner fail to raise that issue in either of the courts below, see Pet. App. A15, C50 n.28, but a favorable resolution of it to petitioner would be of no assistance to him. The district court in this case also held that an upward departure was warranted on a ground that did not depend on a finding that petitioner had participated in Smith's murder. The district court found that the calculation of petitioner's combined offense level pursuant to Guidelines § 3D1.4 produced an inadequate upward adjustment in petitioner's Guidelines range. See Pet. App. C58 n.33. That conclusion was based on the fact that petitioner

had participated in so many offenses that the Guidelines' instructions for upward adjustments based on combined offenses did not adequately reflect the seriousness of petitioner's underlying conduct. *Ibid.* Thus, petitioner likely would have received the same sentence, even if the district court had not considered his involvement in Smith's murder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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